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NORTH CAROLINA REPORTS

VOL. 179

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

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OF

NORTH CAROLINA

FALL TERM, 1919

SPRING TERM, 1920

ROBERT C. STRONG

REPORTER

PRINTED FOR THE STATE BY
MITCHELL PRINTING COMPANY
RALEIGH, N. C.
1920

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1919
SPRING TERM, 1920

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
O. H. Guion	Fifth	Craven.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer*	Eighth	Brunswick.
C. C. Lyon	Ninth	Columbus.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

*Succeeded W. P. Stacy February 16, 1920.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
J. Lloyd Horton	Fifth	Pitt.
J. A. Powers	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. L. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
J. E. Shipman	Eighteenth	Henderson.
Geo. M. Pritchard	Nineteenth	Madison.
G. L. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

SPRING TERM, 1920

The following were licensed to practice law by the Supreme Court, Spring Term, 1920:

Name	*County*	*Postoffice*
Alexander, Uhlman Seymour	Mecklenburg	Charlotte.
Banks, Exum Duval	Wake	Raleigh.
Blackstock, Clarence Ernest	Buncombe	Weaverville.
Bond, Lyn	Chowan	Edenton.
Brewer, Charles Edward	Rockingham	Reidsville.
Bridges, Edwin Breathed	Mecklenburg	Charlotte.
Britt, Luther Johnson	Robeson	Lumberton.
Banks, Veston Colbourne	Pamlico	Grantsboro.
Center, James Massey	Mecklenburg	Charlotte.
Crumpler, Perry George	Sampson	Clinton.
Dawes, Lellon Barnes	Wilson	Elm City.
De Shazo, Charles Bloxton	Johnston	Selma.
Fouts, Dover Reese	Macon	Franklin.
Johnson, David Bunyab	Bladen	White Oak.
Glenn, Onslow Talmage	Person	Rougemont.
Hudson, Isham Barney	Harnett	Dunn.
Jones, Hines Arthur	Guilford	Greensboro.
King, Albert Hill	Alamance	Burlington.
Leatherwood, Dennis Bryan	Haywood	Waynesville.
Le Grand, Nash	Richmond	Hamlet.
McCullen, Samuel David	Wayne	Goldsboro.
McKenzie, Frances Elizabeth	Buncombe	Asheville.
McMillan, Zebulon Vance	Robeson	Red Springs.
Mann, William Marion	Halifax	Enfield.
Le Roy, John Henry, Jr.	Pasquotank	Elizabeth City.
Marshall, William Lawrence	Mecklenburg	Charlotte.
Loftin, Samuel Edward	New Hanover	Wilmington.
Lovelace, William Monroe	Cleveland	Mooresboro.
Olive, Hubert Etheridge	Johnston	Clayton.
Perry, Ely Jackson	Lenoir	Kinston.
Ragland, Carl Howell	Granville	Oxford.
Rand, James Hall	Wake	Raleigh.
Ray, Frank Oliver	Johnston	Selma.
Robbins, Roswell Brackin	Davidson	Lexington.
Robertson, George Thomas	Vance	Henderson.
Rudisill, Justus Coyte	Catawba	Maiden.

Name	*County*	*Postoffice*
Snyder, Henry Leon	Guilford	Greensboro.
Spivey, Alfred Eugene	Bertie	Lewiston.
Washburn, George Fred	Mitchell	Mica.
Watkins, Irvine Beaufort	Vance	Henderson.
Watson, Henry Milton	Oconee	Walhalla, S. C.
Weathers, Bynum Edgar	Cleveland	Shelby.
Wilson, Elbert Ezra	Duplin	Rose Hill.
Woltz, Claude Bernard	Surry	Dobson.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1920

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1920
First District	August 31
Second District	September 7
Third and Fourth Districts	September 14
Fifth District	September 21
Sixth District	September 28
Seventh District	October 5
Eighth and Ninth Districts	October 12
Tenth District	October 19
Eleventh District	October 26
Twelfth District	November 2
Thirteenth District	November 9
Fourteenth District	November 16
Fifteenth and Sixteenth Districts	November 23
Seventeenth and Eighteenth Districts	November 30
Nineteenth District	December 7
Twentieth District	December 14

SUPERIOR COURTS, FALL TERM, 1920

The parenthesis numerals following the date of a term indicates the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Calvert.*

Camden—July 19‡ (1); Nov. 8 (1).
Beaufort—July 26* (1); Oct. 4* (2); Nov. 22 (1); Dec. 20† (1).
Gates—Aug. 2 (1); Dec. 13 (1).
Tyrrell—Aug. 9 (1); Nov. 29 (1).
Currituck—Sept. 6 (1).
Chowan—Sept. 13 (1); Dec. 6 (1).
Pasquotank—Sept. 30 (2); Nov. 15† (1).
Hyde—Oct. 18 (1).
Dare—Oct. 25 (1).
Perquimans—Nov. 1 (1).

SECOND JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Stacy.*

Washington—July 20 (1); Oct. 18 (1).
Nash—Aug. 30 (1); Oct. 11 (1); Nov. 29 (2).
Wilson—Sept. 6 (1); Oct. 4† (1); Nov. 1† (2); Dec. 20 (1).
Edgecombe—Sept. 13 (1); Nov. 15† (2).
Martin—Sept. 20 (2); Dec. 13 (1).

THIRD JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Lyon.*

Northampton—Aug. 2 (1); Nov. 1 (2).
Hertford—Aug. 9 (1); Oct. 18 (2).
Halifax—Aug. 16 (2).
Bertie—Aug. 30 (2); Nov. 15 (2).
Warren—Aug. 20 (2); Nov. 29 (2).
Vance—Oct. 4 (2).

FOURTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Devin.*

Lee—July 19 (2); Sept. 20† (1); Nov. 1 (2).
Chatham—Aug. 2 (2); Oct. 25 (1).
Johnston—Aug. 16* (1); Sept. 27† (2); Dec. 13 (2).
Wayne—Aug. 23 (2); Oct. 11† (2); Nov. 29 (2).
Harnett—Sept. 6 (2); Nov. 15† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Bond.*

Pitt—Aug. 23† (1); Aug. 30 (1); Sept. 13 (3); Nov. 8† (1); Nov. 15 (1).
Craven—Sept. 6* (1); Oct. 4† (2); Nov. 22 (2).
Carteret—Oct. 18 (1).
Pamlico—Oct. 25 (2).
Jones—Dec. 6 (1).
Greene—Dec. 13 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Connor.*

Onslow—July 19† (1); Oct. 11 (1); Dec. 6† (1).
Duplin—July 26* (1); Aug. 30† (3); Nov. 22 (2).
Sampson—Aug. 9 (2); Sept. 20† (2); Oct. 25 (2).
Lenoir—Aug. 23* (1); Oct. 18 (1); Nov. 8 (2); Dec. 13* (1).

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Kerr.*

Wake—July 12* (1); Sept. 13* (1); Sept. 20† (3); Oct. 11* (1); Oct. 26† (2); Nov. 8* (1); Nov. 29† (2); Dec. 13* (1).

Franklin—Aug. 30† (2); Oct. 18* (1); Nov. 15† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Daniels.*

New Hanover—Aug. 9† (1); Aug. 16* (1); Sept. 13† (2); Oct. 18† (3); Nov. 15 (1); Dec. 6† (2).

Brunswick—Aug. 23† (1); Oct. 11 (1).

Columbus—Aug. 30 (2); Nov. 8 (1); Nov. 22† (2); Dec. 20* (1).

Pender—Sept. 27† (2).

NINTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Guion.*

Robeson—July 12* (1); Sept. 6† (2); Oct. 4† (2); Nov. 8* (1); Dec. 6† (2).

Bladen—Aug. 9* (1); Oct. 18† (1).
Hoke—Aug. 16 (2); Nov. 29 (1).
Cumberland—Aug. 30* (1); Sept. 20† (2); Oct. 25† (2); Nov. 22* (1).

TENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Allen.*

Granville—July 26 (1); Nov. 15 (2).
Person—Aug. 16 (1); Oct. 18 (1).

Alamance—Aug. 23* (1); Sept. 13† (2); Nov. 29* (1).

Durham—Aug. 30* (1); Sept. 27† (2); Nov. 8† (1); Dec. 13* (1).

Orange—Sept. 6 (1); Dec. 6 (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Cline.*

Ashe—July 12 (2); Oct. 18 (1).
Forsyth—July 26* (2); Sept. 13† (2); Oct. 4 (2); Nov. 8 (2); Dec. 13* (1).
Rockingham—Aug. 9* (2); Nov. 22† (2).
Caswell—Aug. 23 (1); Dec. 6 (1).
Surry—Aug. 30 (2); Oct. 25 (2).
Alleghany—Sept. 27 (1).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Ray.*

Davidson—Aug. 2 (2); Nov. 22† (2).
Guilford—Aug. 16† (2); Sept. 6 (2); Sept. 20* (1); Sept. 27† (1); Oct. 11† (2); Nov. 8† (2); Dec. 6† (1); Dec. 13† (2).
Stokes—Oct. 25* (1); Nov. 1† (1).

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge McElroy.*

Stanly—July 12 (1); Oct. 11† (1); Nov. 22 (1).
Richmond—July 19† (1); July 26* (1); Sept. 6† (1); Sept. 27† (1); Nov. 8* (1); Dec. 6† (1).
Union—Aug. 2 (1); Aug. 23† (2); Oct. 18 (2).
Moore—Aug. 16* (1); Sept. 20† (1); Dec. 13† (1).
Anson—Sept. 13* (1); Oct. 4† (1); Nov. 15† (1).
Scotland—Nov. 1† (1); Nov. 29 (1).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Bryson.*

Mecklenburg—July 12* (1); Aug. 30* (1); Sept. 6† (2); Oct. 4* (1); Oct. 11† (2); Nov. 1† (2); Nov. 15* (1); Nov. 22† (2).
Gaston—July 19 (1); Aug. 16† (1); Aug. 23* (1); Sept. 20† (2); Dec. 6† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Lane.*

Montgomery—July 12 (1); Sept. 27† (1); Oct. 4 (1).
Randolph—July 19† (2); Sept. 6* (1); Dec. 6 (2).
Iredell—Aug. 6 (2); Oct. 18 (2).
Cabarrus—Aug. 16 (2); Nov. 1 (2).
Davie—Aug. 30 (1); Nov. 15 (1).
Rowan—Sept. 13 (2); Oct. 11† (1); Nov. 22 (2).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Shaw.*

Lincoln—July 19 (1); Oct. 18 (2).
Cleveland—July 26 (2); Nov. 1 (2).
Burke—Aug. 9 (2); Oct. 4 (2); Dec. 6 (2).
Caldwell—Aug. 23 (2); Nov. 15 (3).
Polk—Sept. 20 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Adams.*

Avery—July 5† (1); Oct. 18 (2).
Catawba—July 12 (2); Nov. 1 (2).
Mitchell—July 26 (2); Nov. 15 (2).
Wilkes—Aug. 9 (2); Oct. 4 (2).
Yadkin—Aug. 23 (1); Nov. 29 (1).
Watauga—Sept. 6 (2).
Alexander—Sept. 20 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Harding.*

McDowell—July 12 (2); Sept. 20 (2).
Rutherford—Aug. 23 (2); Oct. 18 (2).
Henderson—Oct. 4 (2); Nov. 15† (2).
Yancey—Aug. 9 (1); Aug. 16 (1); Nov. 1 (2).
Transylvania—July 26 (2); Nov. 29 (2).

NINETEENTH JUDICIAL DISTRICT

(Note the terms of court appear to be confusing on statutes.)

FALL TERM, 1920—*Judge Long.*

Buncombe—July 12 (1); Aug. 2† (1); Sept. 6 (3); Oct. 4† (1); Nov. 1 (2); Dec. 6† (3).
Madison—Aug. 23 (1); Sept. 27 (1); Oct. 25 (1); Nov. 22 (1).

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1920—*Judge Webb.*

Haywood—July 12 (2); Sept. 20 (2).
Cherokee—Aug. 9 (2); Nov. 8 (2).
Jackson—Oct. 11 (2).
Swain—July 26 (2); Oct. 25 (2).
Graham—Sept. 6 (2).
Clay—Oct. 4 (1).
Macon—Aug. 23 (2); Nov. 22 (2).

NOTE.—This calendar is compiled from that of A. B. Andrews, Attorney and Counsellor at Law, Raleigh, N. C.

*Criminal cases. †Civil cases. ‡Civil and jail cases

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, *Judge*, Wilson.
Western District—JAMES E. BOYD, *Judge*, Greensboro.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. ASHE, Clerk.

Elizabeth City, second Monday in April and October. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. ..... Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. T. M. TURRENTINE, Deputy Clerk, Wilmington.

Laurinburg, last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

T. D. WARREN, United States District Attorney, Wilmington.

E. M. GREENE, Assistant United States District Attorney, New Bern.

GEORGE H. BELLAMY, United States Marshal, Raleigh.

S. A. ASHE, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Greensboro, first Monday in June and December.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

WILLIAM C. HAMMER, United States District Attorney, Asheboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1919

ROANOKE RAILROAD AND LUMBER COMPANY v. J. B. PRIVETTE.

(Filed 20 December, 1919.)

Costs—Appeal and Error—Record—Rules of Court.

Where a party to an action in the settlement of a case on appeal insists that the entire charge of the trial judge should be sent up on appeal as a part of the record, and this has been uselessly done over the objection of the opposing party, being unnecessary to the proper presentation of the matters of law involved, the motion of the latter, upon notice, to retax the cost for the full amount of the printed record, will be sustained. Attention of the profession is called to the Rules of the Supreme Court as to sending up unnecessary matter in the record causing useless cost to litigants and the inconvenience of the Court. See Rules of Court, 31, 32, 22 and 19.

MOTION by defendant to retax the costs for printing the record.

Austin & Davenport, Bunn & Spruill, and Small, MacLean, Bragaw & Rodman for plaintiff.

Finch & Vaughan, W. H. Yarborough, J. S. Manning, and J. Crawford Biggs for defendant.

CLARK, C. J. This is a motion by the defendant, upon notice, to retax the costs against the plaintiff for the full amount of printing the record, upon the ground that all the parts of the record printed were necessary, and further, that when the statement of the case on appeal was settled by the trial judge the appellee (plaintiff) insisted that the

entire charge of his Honor should constitute a part of the record on appeal. The plaintiff has not controverted this statement.

Rule 32 provides: "Judge and counsel should not encumber the 'case on appeal' with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument."

It is not intended by the law that the costs of litigation, and of appeals, shall be unnecessarily expensive. For that reason the Court has not only adopted Rule 31 (and Rule 22 therein referred to), but has added the following to Rule 19 in regard to making up the transcript of the record:

"It shall not be necessary to send up as a part of the transcript, affidavits, orders, and other process and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues and the judgment appealed from, shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

"When there are two or more appeals in one action, it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law."

Owing to the high cost of printing it is more necessary than ever to observe these requirements to prevent oppression and useless expense in sending up appeals to this Court.

This Court has always held that the cost of printing unnecessary matter may be taxed against the party causing it to be sent up, regardless of the issue of the appeal. *Wilson v. R. R.,* 142 N. C., 333; *Yow v. Hamilton,* 136 N. C., 357; *Finch v. Strickland,* 130 N. C., 44; *Gray v. Little,* 127 N. C., 303; *Durham v. R. R.,* 108 N. C., 403; *Tobacco Co. v. McElwee,* 96 N. C., 71; *Kivett v. McKeithan,* 90 N. C., 106.

Especially is this so where the party has insisted on unnecessary matter being incorporated in the case on appeal, against the objection of the other party, and printed. *Brazille v. Barytes Co.,* 157 N. C., 454; *Harris v. Davenport,* 132 N. C., 697; *Land Co. v. Jennett,* 128 N. C., 3; *Baker v. Hobgood,* 126 N. C., 149; *Barnes v. Crawford,* 119 N. C., 127. Among the matters unnecessary to be sent up are: having two records when both sides appeal are irrelevant evidence, *Supply Co. v. Machin,* 150 N. C., 738; the referee's reports and exhibits, and evidence when not necessary to the consideration of the case. The decisions on this matter are grouped, 3 Michie's Digest, pp. 739-741.

The Court found that it was absolutely necessary to have the briefs and record printed for the proper consideration of the appeal by each member of the Court, which was impossible when there was but one transcript, and that in manuscript, which was often difficult to read, and unwieldly. But at the same time the Court provided against unnecessary cost of transcripts and printing by the rules above set out.

This has often been ruled, but it is again specially called to the attention of lawyers practicing in this Court to prevent unnecessary expense and the oppression which would often result from a disregard of the protection afforded by the Rules.

The object of the transcript on appeal is not to send up the entire record or history of the case in all its details, but to send up only that part thereof which is actually necessary to present the matter which bears upon the assignments of error to which the attention of the Court is restricted. The requirement of these assignments, which is mandatory, is not only to save the loss of time of the Court in searching through the record for possible errors, but also to save litigants the expense of sending up matter which is unnecessary, and which cannot throw any light upon the errors assigned. There are very few records, probably, that come up to this Court which are not far more voluminous than is necessary for that purpose. We have recently had a record of 500 pages, which it may be said, without exaggeration, could have fully presented the entire matter presented by the assignments of error in half a dozen pages. Such a course as this should be avoided, and we hope our brethren of the bar will aid us in reducing the unnecessary cost of appeals to litigants.

It is not intended to intimate that, in this respect, the plaintiffs should be deemed, as were of old, "those eighteen upon whom the tower in

Siloam fell, that they were sinners above all men." Luke 13:4. Far from it, for the appeals in which unnecessary matter has been sent up, and often in far greater volume, have been many. But the motion has been made in this case to tax unnecessary printing, which has become costly, against the party causing it, and we should again endeavor to protect litigants by again pointedly calling attention to the rules we have prescribed for that purpose, and declare our intention to rigidly enforce them.

The prayer of the motion that "the clerk be directed to tax against the appellee (the plaintiff) the costs of printing the entire record, and not simply the sixty pages," is granted. The allowance for printing, it may be noted, is now $1 per page.

Motion allowed.

SADIE D. CHERRY ET AL. v. MACON L. CHERRY.

(Filed 20 December, 1919.)

Estates—Contingent Interests—Sales—Release—Pleadings—Judgments—Estoppel—Remainders.

An estate to testator's two daughters upon condition that if either of them shall die without leaving lawful issue, then to vest in the surviving sister, but if both of them should die without leaving lawful issue, then to certain of the testator's sons, "to be equally divided between them or among their heirs, *per stirpes* and not per capita." *Held*, the sons having released any interest in the property and filed answer consenting to a decree in proceedings to sell the lands and hold the proceeds for contingent interests *in esse*, and others not *in esse*, under the statute: *Held*, the estate of the two daughters is defeasible in the event of both dying without issue, and not indefeasible upon the birth of issue; and in the future event of their both dying without issue, the estate of the sons would be indefeasible, and their heirs would be estopped by their present release and their answer in the case, the words "their heirs *per stirpes* and not *per capita*" indicating only the division of the remainder.

APPEAL by Bonner, guardian *ad litem*, from *Lyon, J.*, at November Term, 1919, of BEAUFORT.

The plaintiffs, minor children of R. C. Cherry, deceased, through their guardian, filed this proceeding to sell two lots in Washington, N. C., devised to them under the will of their father, setting out that the taxes and assessments, with insurance and repairs, practically exhaust the rents, and that the installation of waterworks and sewage, as now required, will impose an additional burden, and that it is desirable to use the proceeds of the sale for the support and education of said minor. The defendants are the three brothers of these minors and the

guardian *ad litem* of Ethel Cherry (the child of one of them), and is also guardian *ad litem* to represent all others not *in esse* who might have an interest in the property. The three defendants, brothers of the plaintiffs, entered a general appearance and filed an answer consenting to the sale and releasing their interest in the property to the plaintiffs. The summons was served on Ethel Cherry, the minor child of Macon L. Cherry, and John H. Bonner, attorney at law, was appointed guardian *ad litem* for her and all others who might have an interest in the property.

The court adjudged that the lot belonged absolutely to the plaintiffs, Sadie Dot and Madge B. Cherry, the infant plaintiffs. The guardian *ad litem* appealed from the decree because it adjudged that Ethel Cherry and others for whom he had been appointed guardian *ad litem* had no interest or estate, prospective or otherwise, in the property described in the petition, or its proceeds. And this is the only error assigned.

Small, MacLean, Bragaw & Rodman for plaintiffs.
John H. Bonner, guardian ad litem, for defendants.

CLARK, C. J. On 5 December, 1908, R. C. Cherry, by his last will and testament, which has been duly probated and filed, provided in Item 4 of his will: "I devise and bequeath unto my two beloved daughters, Sadie Doe Cherry and Madge Belle Cherry, as tenants in common, the two lots owned by me in the town of Washington (here followed the description of the same), but this devise is made upon condition that if either of my said daughters shall die without leaving lawful issue, then in such event her interest in the said two lots shall immediately vest and go to her sister that survives her, and it is further provided and made a condition of this devise that if both of my said daughters shall die without leaving lawful issue, then it is my desire, and I devise the two said lots to my three sons mentioned in the third item of this my last will, to be equally divided between them or among their heirs, *per stirpes* and not *per capita.*"

The guardian *ad litem* alleged in his answer that Ethel Cherry, only child and prospective heir at law of Macon L. Cherry, has a contingent or prospective interest or expectancy under the will of R. C. Cherry, especially in view of the contingency, which might arise upon the death of Sadie Dot Cherry and Madge B. Cherry, without issue of either; that the contingent or prospective interest of the said Ethel Cherry, under the will of R. C. Cherry, ought to be preserved by the court. Sadie Dot Cherry and Madge B. Cherry are minors, without issue at the present time.

The three sons, who are defendants, have answered and released any

interest in the property, and filed consent to a decree to that effect. The devise being upon the condition that if both daughters die without leaving lawful issue, then the said two lots are devised to the three sons, the estate therefore to the daughters is defeasible in event of the death of both the devisees without issue, and does not become indefeasible upon the birth of issue. *Kirkman v. Smith,* 174 N. C., 605; Rev., 1581.

The remainder to the three sons, however, was not made defeasible, but was vested absolutely in them, and they would be estopped, and their heirs also, by the release and the answer in this case. This would be true if the remainder had been to them and their heirs. *Rees v. Williams,* 165 N. C., 201. This is in no wise changed by the use of the words "their heirs *per stirpes* and not *per capita,*" which indicates merely the division of the remainder between them, and as all three joined in the release all the heirs would be estopped.

Affirmed.

J. T. ODUM v. G. H. RUSSELL ET AL.

(Filed 20 December, 1919.)

Husband and Wife—Estates—Entireties—Survivorship—Deeds and Conveyances—Relationship Not Designated.

The estate by entireties under a deed of lands to husband and wife rests by common law upon their oneness, and does not depend upon the grantees appearing therein to be designated as having such relationship to each other, the fact of this relationship being alone sufficient, the survivor taking the entire estate free from the debts of the other, when the conveyance otherwise is sufficient.

CLARK, C. J., dissenting.

CASE AGREED, submitted to *Calvert, J.*, at November Term, 1919, of ROBESON, involving the title to land.

From the judgment rendered the defendant appealed.

McIntyre, Lawrence & Proctor for plaintiff.
Russell & Weatherspoon in propria persona.

BROWN, J. The deed under which plaintiffs claims was executed by D. D. McCall and wife to J. T. Odum and Florence H. Odum, and was in the usual and ordinary form of a fee-simple deed with covenants of general warranty. His Honor found as a fact that at the time of the execution and delivery of this deed that Florence H. Odum was the wife of J. T. Odum; that she died since the execution of the deed, leaving her sur-

viving five children, who are among the defendants in this action. Plaintiff therefore claims that an estate by entireties was created by this deed, and that upon the death of his wife he became the sole owner of said lands in fee simple by survivorship.

Defendants contend that inasmuch as Florence H. Odum was not described in the deed as being the wife of J. T. Odum, that an estate by entireties was not created, and that the grantees took as tenants in common. The precise question presented is, therefore, whether it is necessary that the parties be described and designated as husband and wife in order to create an estate by entireties.

It is not necessary to create an estate by entireties that the parties be described in the deed as husband and wife. It is not the description or designation of the parties as husband and wife that creates the estate by entireties, but it is the fact that the parties sustain that relation. An estate by entireties rests solely upon the common-law doctrine of the oneness of husband and wife, and inasmuch as they are, in contemplation of law, but one person, they take *per tout et non per my.*

In the findings of fact it is declared that the two grantees, J. T. Odum and Florence H. Odum, sustained a relation of husband and wife at the time of the execution of the deed, although they are not so described in the deed itself. We think this is well settled by repeated adjudications and by the text-books. *Long v. Barnes,* 87 N. C., 329; *Hulett v. Inlow,* 57 Ind., 412; *McLaughlin v. Rice,* 185 Mass., 212; *Appeal of Lewis,* 86 Mich., 340; *Thornberg v. Wiggins,* 135 Ind., 178.

The doctrine is laid down in 13 Ruling Case Law, page 1111, as follows: "In order that a conveyance may create a tenancy by entireties it is not necessary that the grantees be described as husband and wife, or their marital relation referred to."

"So a deed to a man and woman vests title in them as tenants by entireties if they are husband and wife, though the grantees did not have any intent what technical estate should be conveyed to them." *McLaughlin v. Rice,* 185 Mass., 212.

The judgment is

Affirmed.

CLARK, C. J., dissenting: The estate by entireties was not created by statute in England, and has been recognized at no time by any statute in this State. On the contrary, being an estate in joint tenancy, it was abolished by the statute of 1784, ch. 204, sec. 6, now Rev., 1579, which abolished "all estates, real or personal, held in joint tenancy," and converted them into tenancies in common. No one has ever denied that an estate by entireties is an estate in joint tenancy. It was further abolished by the Constitution of 1868, Art. X, sec. 6, which provided

that all property of any married woman, whether acquired before or after marriage, "shall be and remain the sole and separate estate and property of such female."

It follows that when the statute, Rev., 1579, required that all property which is conveyed to any two persons shall be held by them, "as tenants in common and not as joint tenants," that the same rule will apply when it is conveyed to two persons who happen to be man and wife.

The estate by entireties which was created solely by "judicial legislation" persists and continues to live, in spite of statutory and constitutional abolition solely by "judicial recognition." It is argued that because other judges have so held, that this anomalous and troublesome estate which continually comes up to defeat the rights of married women must continue, notwithstanding the act of 1784 and the Constitution of 1868. We had exactly the same anomaly in the doctrine that a man was not punishable for thrashing his wife if he did not permanently injure her. That doctrine, like the estate by entireties, was created by judicial legislation at a time when the judges of England were almost without exception priests, and without statutory recognition it was continued in this State long years after it was repudiated by the courts of England, and in the other States of this country. It was expressly held as late as *S. v. Black,* 60 N. C., 263, upon the ground that the husband should use "such degree of force as is necessary . . . to make her behave herself." In *S. v. Rhodes,* 61 N. C., 454, the judge below held that the husband "had a right to whip his wife with a switch no larger than his thumb, even if there was no provocation on her part." The Court said that the law had been repudiated elsewhere, and had never been adopted by some of our States at all, and said that such ruling "will always be influenced by the habits, manners, and condition of every community."

S. v. Rhodes was approved in *S. v. Mabry,* 64 N. C., 593, with some explanation. When the point came up again the Court evidently thought that "the habits, manners, and condition of the community" had improved, for in *S. v. Oliver,* 70 N. C., 61, *Settle, J.*, said, after quoting the doctrine, "The courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances." This was in 1874, nearly nine years after the master's right of chastisement of colored slaves had been abolished.

It would seem that the same course should be taken in this case for both propositions—the right of the husband to violate the personal rights of the wife by chastising her "even without provocation," and his right to assume the ownership of her property in violation of her property rights guaranteed by the Constitution—have exactly the same origin in

"judicial legislation" of the very remote past, and have survived to us from a lower stage of civilization, and are not in accord with the legislation or the ideas of this age. Besides, as to the estate by entirety, we have the statutory abolition of all joint tenancies, which necessarily include the estate by entirety, and the constitutional provision abolishing any right in the wife's estate to accrue to the husband by virtue of marriage.

It is true, as said in *Gooch v. Bank,* 176 N. C., 217, that this Court has more than once suggested to the Legislature to abolish the estate by entireties, *Bynum v. Wicker,* 141 N. C., 96; *Finch v. Cecil,* 170 N. C., 75, and in other cases. The Legislature has not done so, either because the so-called estate by entireties not having been created by any legislation, that body thought the Court, which was alone responsible for its continued existence, should repudiate it, as the Court had repudiated the other doctrine in *S. v. Oliver,* or it may be because of lack of interest in the matter.

The assertion that the estate by entireties is based upon the doctrine that "husband and wife are one" is merely an assertion. They are not one as a matter of fact, and they are not one as to the husband's right to appropriate the property of the wife, for that was absolutely abolished by the Constitution of 1868. The phrase was simply a euphemism, based on the wife being the chattel of the husband, which was absolutely true at the time when the courts in England created, without legislation, the right of the husband over the wife by chastising her person and appropriating her property. At that time, by the ruling of the Courts the personal property of the wife became absolutely the property of her husband, and this remained so in this State till 1868, and hence there was no estate by entirety in personal property. *Gooch v. Bank, supra.* As to realty, that became the property of the husband absolutely during their joint lives, and his in fee if he were the longest liver. If she survived, for feudal reasons, this realty survived to her. Under the former law the property of the wife became the property of the husband for the same reason that the property of slaves belonged to their masters.

The land in question was conveyed to J. T. Odum and Florence H. Odum. If a deed or devise should provide expressly that property should pass to the husband for life, but exempt from execution for his debts, with remainder to him in fee, should he outlive his wife, and to her should she be the longest liver, it is more than doubtful if such conveyance would be valid so far as the exemption from liability for the husband's debts is concerned, but when the conveyance is to J. T. Odum and Florence H. Odum, Florence H. Odum plainly became the owner of an one-half undivided interest in fee simple to said property. The deed so provides, and there is no statute to the contrary, and Rev., 1579,

requires that it shall be so construed, and the Constitution of 1868 enacts that the husband shall acquire no interest in his wife's property *de jure marito*. It follows that on the wife's death her undivided half interest in this realty passed to her five children subject only to the tenancy by the curtesy, and then only provided she left no will, for the Constitution gave her the absolute right to own and devise her property, real and personal, free from any debts or obligations of the husband.

BOARD OF COMMISSIONERS OF ROBESON COUNTY v. C. N. MALONE ET AL.

(Filed 20 December, 1919.)

Elections—Notices—Irregularities—Municipalities—Bond Issues.

Where the election for the issue of bonds by a township for road purposes has been held in all respects in accordance with the provisions of a statute, at the usual polling places, etc., they will not be declared invalid at the instance of a purchaser, on the ground that notice of the new registration ordered had not been advertised for the full twenty-day period stated in Rev., 4305, amended by the Laws of 1913, or that the full period of the thirty-day notice of the time and place of the election had been advertised as set out in Rev. 2967; sec. 47, ch. 56, Consolidated Statutes, Vol. I, when there is no suggestion of fraud and full publicity had been given by newspapers of large local circulation, the election had been broadly discussed beforehand, and it does not appear that any voter is objecting to the bonds or has been deprived of his right to vote.

APPEAL by defendant from *Calvert, J.*, at December Term, 1919, of ROBESON.

This is a controversy without action, submitted under an agreed case.

Under the authority of an act of the General Assembly of North Carolina passed at the session of 1919, entitled "An act to authorize the issue of township road bonds for the townships of Robeson County," the board of commissioners, at their regular meeting held on Monday, 7 April, 1919, ordered an election for Lumberton Township to vote on the question of issuing the bonds of the township in the sum of $100,000 for road purposes. A new registration was ordered for the township, and it was ordered that notice of the election be posted at the courthouse door, being the voting precinct of the township, for thirty days prior to the day of election and notice published in the *Robesonian* for four weeks in succession prior to the day of election. The election to be held on 20 May, 1919.

It was forty-four days from the ordering of the election to the day of election. The notice of election was posted at the courthouse door, being

the voting precinct, for thirty-three days prior to the day of election, and was published in the *Robesonian* in its issues 24 April, 1, 8, and 15 May. The following is a copy of the notice so posted and published:

"NOTICE OF LUMBERTON TOWNSHIP ROAD BOND ELECTION.

Notice is hereby given that the board of commissioners of Robeson County has ordered an election for Lumberton Township, Robeson County, for the purpose of allowing the voters of the township to vote on the question of issuing one hundred thousand dollars in bonds for the township for road purposes. Notice is further given that said election will be held at the voting precinct in said township in the town of Lumberton on the 20th day of May, 1919, and to that end a new registration has been ordered for said election, and that only those who register for said election will be allowed to vote in the election. Notice is further given that Wade Wishart has been appointed as registrar, and that the registration books will be open on the 17th day of April and remain open until sunset on Saturday the 10th day of May, 1919, Sundays excepted, and that on Saturday, the 19th and 26th days of April, and on Saturday, the 3d and 10th days of May, 1919, said registrars will attend at the voting precinct in said township with said registration books from nine o'clock in the forenoon until sunset for the purpose of allowing those who appear for that purpose to register.

This the 16th day of April, 1919.

BOARD OF COMRS. OF ROBESON COUNTY,
By M. W. Floyd, Clerk."

The registration books were kept open for twenty-two days during the time required by law. The election was held on 20 May, 1919, and resulted in favor of the bond issue as shown from the election returns.

At the regular meeting of the board of commissioners on Monday, 5 May, on a petition filed and under authority of said act of assembly, the board of commissioners ordered an election for Maxton Township to vote on the question of issuing $100,000 in bonds for road purposes. A new registration was ordered as provided in said act, and the election ordered to be held at the voting precinct in Maxton Township. It was forty-three days from the date the election was ordered until the day the election was held, and, under order of the board of commissioners, notice of the election was posted at the courthouse door of Robeson County, and at the voting precinct in Maxton Township for thirty days, and published in the *Robesonian* for four weeks in succession prior to the day of election. The notice of election was posted at the courthouse door and at the voting precinct in Maxton Township for thirty-five days, and the registration books were kept open for the registration of

voters for twenty-three days. The notice was similar to the one posted and published for the election in Lumberton Township.

In both elections the polls were properly opened at sunrise and closed at sunset, and the ballots canvassed and returned as provided in the act of assembly.

The said act of the General Assembly prior to the ordering of the said elections was published in full in the *Robesonian,* a newspaper published in the town of Lumberton with wide circulation in both Lumberton and Maxton Townships. After the April meeting of the board of commissioners, and also after the May meeting of the board of commissioners, the order of the board calling the election was published in the *Robesonian* and commented on in the editorial columns of the paper. Also the calling of the election in both townships was commented on by the *Lumberton Tribune,* a newspaper published in the town of Lumberton with wide circulation in Lumberton and Maxton townships.

There was no change in voting precincts in either township for these elections, but the elections were both held at the well established places for holding of elections in each township.

The defendants are the purchasers of the $100,000 of Lumberton Township and $100,000 of Maxton Township road bonds at a sale held on 27 August, 1919, and they decline to accept and pay for said bonds, contending that the election held in Lumberton Township, Robeson County, North Carolina, on the 20 May, 1919, on the question of the issuance of $100,000 of road bonds by said township was not held according to law, and that, therefore, the bonds advertised and sold on 27 August, 1919, are not the legal and valid obligations of said township; and that the election held in Maxton Township, Robeson County, North Carolina, on 18 June, 1919, on the question of the issuance of $100,000 of road bonds by said township was not held according to law, and that, therefore, the bonds advertised and sold on 27 August, 1919, are not the legal and valid obligations of said township for the following reasons:

1. That twenty days notice of a new registration was not given as required by section 4305 of the Revisal of 1905, as amended by chapter 138, Laws of 1913.

2. That thirty days notice of the election was not given as required by section 2967 of the Revisal of 1905; section 47, chapter 56, of Consolidated Statutes, vol. 1.

His Honor entered judgment in favor of the plaintiffs, declaring the bonds to be valid and requiring the defendant to pay for them, and the defendant excepted and appealed.

E. J. Britt and McLean, Varser, McLean & Stacy for plaintiff.
G. A. Thomasson and Chas. N. Malone for defendant.

ALLEN, J. The statutory requirements in regard to holding elections to authorize the issue of bonds, have not been complied with to the letter, but the agreed facts show more than usual caution to give full and ample notice of the new registration and of the time and place for holding the elections, and it does not appear that any one has been deprived of his right to register and vote by reason of the irregularities, or that any voter or taxpayer of Lumber or Maxton townships is now registering the issue of the bonds.

On the contrary, it is fair to presume that all the taxpayers are content with the result of the elections, since no action has been instituted in their behalf, no application has been made for them to be parties to the present action, and the only complaining party is the defendant, who has no standing in Court except as a purchaser of the bonds.

The irregularities are not sufficient to invalidate the bonds, in the absence of fraud, and none is alleged or suggested.

"Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has even been held that gross irregularities not amounting to fraud do not vitiate an election." 15 Cyc., 372.

"It is clear that since an entire failure to give the special notice required by a statute does not necessarily avoid a general election, an imperfect or defective notice which does not mislead electors so that they lose the right to exercise their franchise, certainly will not do so. And it is equally clear in the case of special elections wherein the necessity for notice is so much more urgent, that the rule as to compliance with statutory requirements in the giving of notice should be much more strictly enforced. Considerable liberality is, however, allowed even in these elections, and it is a rule of pronounced authority that the particular form and manner pointed out by a statute for giving notice is not essential, provided, however, there has been a substantial compliance with statutory provisions. Following this rule, it has been held that where the great body of the electors have actual notice of the time and place of holding the election, and of the questions submitted, this is sufficient; and so the formalities of giving notice, although prescribed by statute, are frequently considered directory merely in the absence of an express declaration that the election shall be void unless the formalities are observed. This liberal rule is based upon the theory that where the people have actually expressed themselves at the polls the courts are strongly inclined to uphold rather than to defeat the popular will." 9 R. C. L., 992.

"An irregularity in the conduct of an election which does not deprive

a voter of his rights or admit a disqualified person to vote, which casts no uncertainty on the result, and which was not caused by the agency of one seeking to derive a benefit from the result of the election, will be overlooked when the only question is which vote was greatest. The same principles are applicable to the rules regulating the registration of electors." *Briggs v. Raleigh,* 166 N. C., 153.

The same principle was applied and an issue of bonds sustained in *Hill v. Skinner,* 169 N. C., 411, which was an action by the taxpayer in which there was a special election and a new registration ordered, and the notice of the new registration was only published fifteen days and the registration books kept open eight days, when the statutory requirement in the first instance was thirty days, and in the second twenty, irregularities more serious than in the present one.

We are of opinion the bonds are valid, and that the judgment must be Affirmed.

JOHN BYNUM ET AL. V. BENJAMIN BYNUM.

(Filed 20 December, 1919.)

1. Parties—Proceedings—Quasi in Rem—Courts—Jurisdiction—Nonresidents—Unknown Parties.

Courts having jurisdiction in proceedings *quasi in rem*, by observing the statutory methods, have the power to make valid decrees affecting the status, condition, and ownership of real property, situated within the State, and, in proper instances, the same may be made effective both against nonresidents and persons unknown.

2. Same—Partition—Tenants in Common—Summons—Publication—Sales—Purchaser—Title—Deeds and Conveyances—Judgments.

Where, in special proceedings for the partition of lands among the deceased owners, it is properly made to appear that one of them has been missing for twenty years or more and cannot be found, nor can it be ascertained whether or not he had children or lineal descendants; that summons has been issued for him, returned not to be found, and then notice by publication had been duly published for him or his descendants, without avail; Rev., 2490, and the interests of each of the parties has been duly ascertained and established; it is *Held*, under a motion to collect the purchase money under Rev., 1524, bid by a purchaser at sale for division, that such purchaser may not successfully resist payment on the ground of a defect in title for that the commissioner's deed would not preclude the claims of the missing heir or his heirs; but that the decree should provide for the reinvestment or security of the share of the missing party or his real representatives, Rev., 2546, which, however, in no wise affects the title to be conveyed.

BYNUM *v.* BYNUM.

SPECIAL PROCEEDINGS for partition and sale, heard on appeal from clerk, before *McElroy, J.*, at November Term, 1919, of FORSYTH.

The question presented arose on a motion to collect the purchase money, under Rev., 1524, from P. Huber Hanes, who had bid off a portion of the property at a judicial sale of same, held under a decree in the cause, and the facts relevant to the inquiry and agreed upon by the parties are as follows:

"This was a special proceeding for partition, begun before the clerk of the Superior Court of Forsyth County, by summons issued as above, on 9 October, 1918, returnable before said clerk on 21 October, 1918."

Said summons was, on 9 October, 1918, returned by the sheriff of Forsyth County, indorsed as follows: "Not served. The defendants not to be found in Forsyth County."

On 9 January, 1919, the petition was filed in said cause, setting forth that the plaintiffs, together with the defendant, were all the heirs at law of H. W. Bynum.

This petition, among other things, asserted that Benjamin Bynum had not been heard from for twenty or thirty years, and was dead. Said petition then proceeded to allege the interest of the plaintiffs in the land, and prayed that Benjamin Bynum be adjudicated dead without heirs, and that a decree be made directing the lands therein described to be sold.

Thereupon the clerk took certain testimony touching the question of the whereabouts and existence of Benjamin Bynum, and on 24 January, 1919, found that Benjamin Bynum had not been heard from for more than twenty years, and that he was dead, intestate without issue, and also found the interest in said lands to be altogether in the plaintiffs, and ordered and directed the appointment of a commissioner and sale of said land. Said sale was had, at which sale the respondent, P. Huber Hanes, was the purchaser, at $14,000. Said sale was confirmed on 7 May, 1919.

At or about this stage of the proceedings the purchaser was advised that the title which the commissioners offered him was defective for the reason that there was no service of process upon Benjamin Bynum in life, and that the court was without authority to adjudicate him dead without issue, and said purchaser declined to take the title, unless and until this alleged deficiency and defects were remedied.

On 23 May, 1919, by an affidavit filed in the cause, service of process by publication was asked to be had on Benjamin Bynum, if living, and if dead, upon his heirs, if any, whose names and whereabouts were said to be unknown. On 10 June the clerk of the Superior Court signed an order of publication requiring his heirs, whose names were unknown, to likewise appear before said clerk on 10 July, 1919.

Publication of process was had, as will appear in the transcript of the record.

On 17 September, 1919, upon an affidavit filed, a motion was made and notice was served on P. Huber Hanes to show cause why he should not pay to the commissioner the purchase price and take a deed therefor.

To this notice, on 17 October, 1919, the said P. Huber Hanes filed an answer, wherein he stated, upon information and belief, that the title offered by the commissioner was not a good and valid title, because the record as made does not pass the interest of the said Benjamin Bynum, if living, and, if dead, of any children that he may have left, and averring that the court did not have the authority and jurisdiction to adjudicate the death of Benjamin Bynum, and averring that the said court was without authority and jurisdiction to bring in the heirs at law of said Benjamin Bynum, by publication of summons.

The court, affirming the action of the clerk, entered judgment that the commissioner could make a good title, and the purchaser comply with his bid.

From such judgment the purchaser, having duly excepted, appealed.

Lindsay Patterson for plaintiff.
Manly, Hendren & Womble for appellant.

HOKE, J., after stating the case: The power of a court having jurisdiction, by proceedings, *quasi in rem,* and observing the statutory methods as to service of process, to make valid decrees affecting the status, condition, and ownership of real property, situate within the State, is fully recognized with us, and, in proper instances, the same may be made effective both against nonresidents and persons unknown. *Lawrence v. Hardy,* 151 N. C., 123; *Vick v. Flourney,* 147 N. C., 209; *Bernhardt v. Brown,* 118 N. C., 701.

In *Vick v. Flournoy* the general principle is stated as follows: "The courts of this State have jurisdiction of the persons of nonresident defendants to the extent required in proceedings *in rem* or *quasi in rem,* when personal service is made by complying with the requirements of Rev., 448, and the property is situated here." And, in *Lawrence v. Hardy,* as applied to a sale under partition proceedings, it was held that: "Our courts have general power, in following provisions of Rev., 2490, relating to the service of process by publication, to acquire jurisdiction and make decrees affecting the condition and ownership of real property situate within the State, *i. e.,* in proceedings *quasi in rem;* and this section is not subversive of the 'due process' clause of the Constitution."

And, under our liberal procedure applicable, the essential and proper

parties to a valid disposition of the cause may be brought in pending the litigation, or even after judgment, and where the interest of such parties is presented by amendment or sufficiently appears from the pleadings already filed, the proceedings will bind to the extent of the jurisdictional authority of the court having the matter before it. Rev., 507, 449, 414, etc. In our general statutes ample provision is made for service of process on nonresidents. Rev., 442-448, *et seq.*, and under ch. 59 of Revisal, for partition and sale of real property. In section 2490 it is expressly enacted that persons unknown may be made parties by publication when they are interested in the property and their names are unknown, and cannot, after due diligence, be ascertained, etc. From a perusal of petition and facts in evidence, it appears that, under this statute, proper publication has been made for nonresidents and parties unknown; their interest is fully disclosed in the pleadings, and, under the principles heretofore stated, there is no reason why the deed of the commissioner, who has sold the property under a decree in the cause, is not in a position to convey a good title. From an examination of the statute under which the proceedings was had, Rev., ch. 59, it would seem that, while the court is authorized to direct sale and conveyance of the title to the purchaser, it is without power to enter a decree destroying or invalidating the claim or interest of Benjamin Bynum or his unknown heirs. Section 2516 of the act expressly provides that the court shall, by its decree, provide that the share of any party to the proceedings, when an infant, married woman, etc., nonresident, or whose names are unknown, shall be invested or secured for such party or his real representative, etc. This, as stated, in no wise interferes with power to free the title and make a valid conveyance of the same.

The court having jurisdiction of the parties and the subject-matter, to that extent and for that purpose, the proper care and distribution of the proceeds is not of concern to the purchaser. *Dawson v. Wood,* 177 N. C., 158; *Pendleton v. Williams,* 175 N. C., 248.

In the final decree, however, the court, acting under the statute, shall make such provision for the disposition of this interest as the right and justice of the case may require. Speaking to this matter, in *Lawrence v. Hardy, supra,* a case that is to a great extent decisive of the questions presented in this appeal, the Court said: "A court dealing with the matter should always be properly careful of the rights and interests of the parties who are only so by reason of constructive service. If such rights are questioned or assailed, the statute provides that some disinterested person may be appointed to represent them and look after their interests, and this should, in most instances, be done. If these interests are known to exist, or there is good reason to believe that they do, a sufficient amount of the fund should be retained to satisfy such claims

and be invested or settled so that it may be forthcoming when called for. This the statute expressly requires (Rev., 2516), and if there is promise of success, further effort can and should be made to ascertain and notify the rightful owners; but the policy of the law is, and has always been, that our land shall pass into the possession of home owners, and with assured and unencumbered title, and this wise and beneficial purpose should not be prevented nor seriously hindered because in rare and exceptional instances a wrong may be possible."

There is no error in the record, and the judgment directing payment of the purchase money is

Affirmed.

NORTH CAROLINA PUBLIC SERVICE COMPANY AND SALISBURY AND SPENCER RAILWAY COMPANY v. SOUTHERN POWER COMPANY.

(Filed 20 December, 1919.)

1. Pleadings—Demurrer.

A *demurrer ore tenus*, after answer filed, admits the allegations of the complaint, and if any part thereof is sufficient, construing liberally every reasonable intendment or presumption in favor of the pleader, the pleading will be sustained.

2. Monopoly—Discrimination—Corporations—Public Service—Electricity—Hydroelectric—Courts—Jurisdiction.

Where a public-service corporation has acquired, under a long-term contract with another company, the control over a large territory of the exclusive right to furnish hydroelectric power and light to municipalities, and to other public-service corporations, for distribution or retail to the consumers, including subsidiary companies that it owns or controls, it may not discriminate among its patrons under the same or substantially similar conditions as to the rate charged, or select its own customers, but the same, being affected with a public use, is subject to the control and jurisdiction of our courts.

3. Courts—Jurisdiction—Corporations—Public Service—Charter Powers—Other Public-Service Corporations — Electricity — Hydroelectric Companies.

Where a public-service corporation engages in a class of business authorized by its charter, it dedicates its property to that particular class of use, and where a hydroelectric company having a monopoly has been authorized by its charter to sell to other electric companies, etc., power, etc., for retail or distribution among customers, it may not resist the jurisdiction of our courts upon the ground that they were not legally required to do so, though the distributing or retail company is in some sense a competitor, and has the charter right to generate or manufacture its own electricity.

4. Mandamus—Corporations—Public Utilities—Discrimination—Rates—Courts.

Where a public-service corporation has discriminated among its patrons in its charges for the same or similar service, a mandamus will lie to compel it to charge a uniform or undiscriminating rate; for the question does not require the courts to fix a rate, or pass upon its reasonableness, the lowest rate charged becoming, automatically, the proper one.

5. Monopolies—Hydroelectric Corporations—Public Utilities—Electricity Rates— Discrimination— Subsidiary Companies — Earnings — Mandamus.

Where the owners of a public utilities corporation, for the generation of hydroelectric power, sell it to another company that they own or control, issue bonds for the purchase price to its full value, and issue additional stock to themselves, then enter into a long-term contract to supply the vendor company with hydroelectric power at a low rate, and have subsidiary companies which they supply at a certain rate, for retail or distribution among consumers, as also certain municipalities, within the territory under its control, it is required to supply such power to other public utility companies at the same and not a discriminatory rate, without reference to the rate such other company charges the consumers it supplies; and objection that the company is required to pay the interest on its bonds, running expenses, etc., out of its profits will not be considered when it appears, by demurrer, that the net earnings were more than sufficient.

BROWN, J., concurring; ALLEN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendant from *Shaw, J.*, at chambers, 15 October, 1918, from GUILFORD.

This was a *mandamus* against the Southern Power Company to compel it to continue to furnish electric current from its substation at Salisbury to the plaintiffs for the use and benefit of Salisbury, Spencer, and East Spencer, and the inhabitants thereof, and for operation of the electric street car system, as theretofore furnished, and to compel said Southern Power Company to furnish such service, power, and current, and without discrimination in favor of others for like service, under the same or substantially similar conditions. The Southern Power Company answered, and in addition demurred *ore tenus* to the complaint, alleging:

1. That the court has no jurisdiction to compel it to furnish electric current and power from its substation at Salisbury to the plaintiff for the purpose set forth in the complaint; and

2. That the court has no power or jurisdiction to require the defendant to furnish power at a uniform rate without discrimination against the plaintiffs.

The court held that it had jurisdiction to pass upon and determine the matters set out in the complaint, and that the complaint states a good cause of action.

The complaint avers that the plaintiff, Salisbury & Spencer Railroad Company, is a public-service corporation under the laws of this State, which operates a street railway, electric light, and gas plant in Salisbury, Spencer, and East Spencer, its franchise rights being granted by those cities to operate the street railway by electricity and to furnish electric current for the public lighting of said cities, and to the inhabitants of the same for domestic and power purposes. On 11 January, 1912, it leased all of its rights and property to its coplaintiff, the North Carolina Public Service Company, for a period of fifty years. The latter company is a public-service corporation, chartered under the laws of this State, with its principal offices in Greensboro, and it owns a large part of the capital stock of the Spencer & Salisbury Railroad Company, and has for many years past, and still does control and manage the same through the 50-year lease, including the purchase of electric power from the defendant, and its distribution to said city for domestic and industrial use as well as the public lighting for the streets of the three said cities, and it also owns and operates similar properties in Greensboro, High Point, and Concord, N. C.

The defendant power company is a public-service corporation, chartered in New Jersey, and doing business in this State, with its principal office in Charlotte. It is engaged directly and indirectly in the business of generating hydroelectric power by means of dams built across large streams of water, which, by suitable machinery, is converted into electric power and conveyed over large wires by heavy voltage in great quantities to "receiving substations." At these stations large transformers are installed by the defendant company, by which the current thus received is "stepped down"—that is, reduced from 100,000 voltage to as low as 2,300 volts, and after being so reduced the power is sold and distributed to various and sundry consumers connected with these substations. At each of these substations the agent of the defendant company keeps a record, by means of separate meters, of the amount of electric power furnished each consumer. The defendant has built transmission lines to various points in western and piedmont North Carolina: Gastonia, Concord, Salisbury, Spencer, Statesville, Winston-Salem, High Point, Greensboro, Burlington, Graham, Hillsboro, Durham, Spray, and Reidsville, and to many cotton mills and other industrial plants along or near its lines connecting these various cities and localities, and at each of the above places, it maintains and operates various substations, as above described.

The defendant power company is a public-service corporation, and only by reason thereof enjoys the right of eminent domain under which it has been enabled to construct and operate these lines, and the said company is the only hydroelectric company whose transmission line extends to the points above named, including the towns of Salisbury,

Spencer, and East Spencer. It enjoys, therefore, a monopoly of this business, and also by long service its business is "affected with a public use," and it is therefore subject to public control and regulation not only in fixing and prescribing its rates, but more especially in the requirement that it shall furnish its facilities at the same rate to all receiving them under like conditions. The plaintiff, the North Carolina Public Service Corporation, prior to the time the defendant's transmission line was completed at Salisbury, generated its own electric current and power by a local steam plant, but about ten years ago the defendant approached the plaintiffs, assuring them that it would furnish power at less cost than it could be produced by steam generated from coal, and on this assurance the plaintiff and a large number of mills, factories, and other industrial plants were induced to discontinue their steam plants and made contracts with the defendant for their necessary electric current and power. Thereby the defendant acquired a complete monopoly of the hydroelectric power market at Salisbury and Spencer. The contract between the plaintiffs and the defendant was for ten years, and expired August, 1918. Under that contract the defendant charged the plaintiffs a rate of 11 mills per Kw. H. Some months prior to the expiration of this contract the defendant proposed to the plaintiff Public Service Company to make a new contract for the same service for another ten years at a substantial increase in rates. The defendant refused to contract for a period of less than 5 years, and persisted in demanding an increase in rates, and sent its agent to the home office of the plaintiff, North Carolina Public Service Company, in Greensboro, and demanded that the contract which it then presented should be signed within 48 hours. The rate stipulated in said contract was greatly in excess of the former rate, being increased to 15 mills per Kw. H., and was based upon the then war price of coal, according to the statement of defendant's agent.

The plaintiff especially objected to this increase of increased rate on the ground that it was beyond the rate charged by the defendant to other companies for like service under the same or substantially similar conditions, and the plaintiff declined to sign said contract.

The defendant power company, after the expiration of the ten-year contract, rendered the public service company bills for current and power at the rate of 18 mills per Kw. H., and notified the plaintiff that if this rate was not paid it would discontinue supplying current to the plaintiff at Salisbury. The president of the defendant power company is J. B. Duke, who is the principal owner thereof, and controls its policy and management. He is also largely interested financially in various cotton mills in North and South Carolina, and in street power and street railway and electric lighting also, some of which mills and plants are located in Charlotte, Gastonia, Concord, and Durham, and all are fur-

nished light and power through the current received from the defendant power company, which has been and is selling current to those mills at a maximum rate of 11 mills per Kw. H., and in some instances to be used for power and lighting the mills and villages and other plants in which the defendant's principal owner is interested, and in some instances at a lower rate, greatly less than is charged and proposed to be charged the plaintiffs under substantially similar conditions; the said J. B. Duke is also the principal owner, either directly or indirectly, through his immediate, family, of a subsidiary corporation of the Southern Power Company, known as the "Southern Public Utilities Company," which last named company owns the public utility franchises in Charlotte, Winston-Salem, Reidsville, and other towns and cities, and is now engaged in furnishing hydroelectric power and lights to those municipalities.

The power is furnished by said defendant company to the public utilities company, one of its subsidiary companies, at its substations in Charlotte, Winston-Salem, and Reidsville, under a long-term contract extending to 1944 at a less rate than it now charges the plaintiffs for current furnished under substantially similar conditions at its substation near Salisbury. The defendant power company is now selling distributing power from its substation at Salisbury to the Vance Cotton Mill under a contract entered into in the past year, and since the war began, at a rate of 11 mills per Kw. H., for day service, and at a still lower rate for night service, and for the same service through the same substation under substantially the same conditions it is charging these plaintiffs 18 mills per Kw. H. The defendant power company is also furnishing current and power to the municipality of Salisbury from the same substation for water pumping services at a rate of 1 cent per Kw. H., and for like service under similar conditions is charging these plaintiffs 1 cent 8 mills per Kw. H., or nearly double.

The plaintiffs are among the largest single purchasers and consumers of power and current from the defendant's substation at Salisbury and Spencer, and on account of the growth of those towns and their increased demand for power and current the plaintiffs are unable to supply the same except by purchase from the defendant through its substation. This fact is well known to the defendant, and it declines to contract with the plaintiff to furnish it power and current for a less period than 5 years, and only at a far higher price, based on the present war price of coal, and threatens to cut off its supply of current unless it will submit to the discrimination, which would leave Salisbury and Spencer without lights for the homes and places of business of their people, and without power for the operation of their industrial plants or any means of operating the street railway.

The defendant's first proposal to renew its contract in 1917 was for a charge of 14 mills per Kw. H., which it raised at the expiration of the

contract in 1918 to a charge of 15 mills per Kw. H., when at that time it was selling power and current to Reidsville and its inhabitants under a contract for 10 years, entered into in 1917 at a rate of 14 mills.

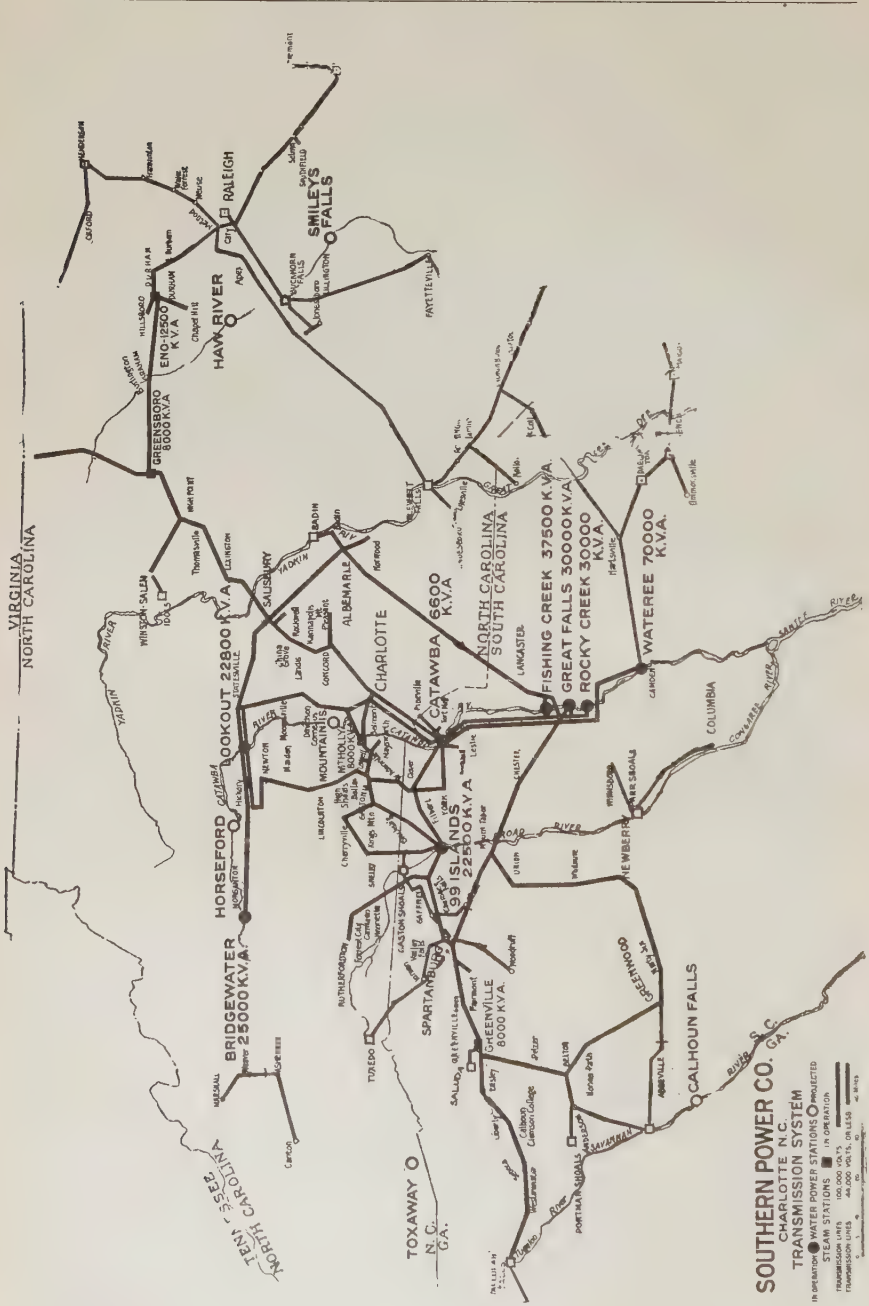
To maintain a consistent and auxiliary supply of current and power in case of accident or low water the defendant power company has at several points along its line built steam plants, which it operates by the use of coal. Substantially all the power and current furnished these plaintiffs at Salisbury is generated by means of water, which cost the defendant power company 4 mills per Kw. H., and it now proposes to discriminate against the plaintiffs by requiring them to pay for current and power under a long-term contract based on war-time cost of coal, at a much higher rate than in any case it charges the cotton mills along its line or its subsidiary company (or alias), the Southern Public Utilities Company, for like service rendered under substantially similar conditions.

The defendant power company has no established rates of furnishing power in the absence of a contract, and no rates for such power has ever been filed with the Corporation Commission, and the Corporation Commission has never promulgated any rules or regulations to prevent discrimination by the defendant in furnishing power.

The defendant power company, on 8 February, 1914, filed with the Corporation Commission of North Carolina a partial schedule of its rates with the added statement: "Each case must be treated on its peculiar circumstances, and the rates are subject to the reasonable rules and regulations of the power company's charter. The filing of these rates by this company is in deference to the request of the commission, and must not be treated or considered and done because any legal obligation is imposed upon it to file the same. This company is advised that no legal obligation exists." The Corporation Commission expressed the opinion to the plaintiff that it had no authority under the act of the Legislature conferring upon it jurisdiction with respect to the regulation of public utilities to pass upon a question involving a contract between one public utility company and another public utility company as here presented.

The defendant power company, justifying its increase in rates charged these plaintiffs, says: "Which increased rate is absolutely necessary to earn any income upon its capital invested in its hydroelectric power plant."

The plaintiffs, replying to this proposition, state in substance that the Southern Power Company was incorporated in New Jersey, in June, 1905, by J. B. Duke and others, and has acquired rights and built power plants on the Catawba and Broad rivers in South Carolina, capable of developing a rated capacity of 88,000 h. p., and it has also built trans-


SOUTHERN POWER CO.
CHARLOTTE N.C.
TRANSMISSION SYSTEM
IN OPERATION ● WATER POWER STATIONS ○ PROJECTED
STEAM STATIONS ■ IN OPERATION
TRANSMISSION LINES 100,000 VOLTS
TRANSMISSION LINES 44,000 VOLTS, OR LESS
VIRGINIA
NORTH CAROLINA
TENNESSEE
NORTH CAROLINA
TOXAWAY
N.C.
GA.
S.C.
GA.
RALEIGH
SMILEYS FALLS
HAW RIVER
ENO-12500 K.V.A.
GREENSBORO 6000 K.V.A.
WINSTON SALEM
LOOKOUT 22800 K.V.A.
SALISBURY
ALBEMARLE
CHARLOTTE
CATAWBA 6600 K.V.A.
NORTH CAROLINA
SOUTH CAROLINA
FISHING CREEK 37500 K.V.A.
GREAT FALLS 30000 K.V.A.
ROCKY CREEK 30000 K.V.A.
WATEREE 70000 K.V.A.
HORSEFORD
BRIDGEWATER 25000 K.V.A.
99 ISLANDS 22500 K.V.A.
SPARTANBURG
GREENVILLE 8000 K.V.A.
COLUMBIA
CALHOUN FALLS

mission lines as stated in the plaintiffs' complaint, and which is further illustrated by the annexed copy of the map of its lines issued by the defendant company.

The plaintiffs further say that the defendant company organized another corporation, which is controlled by it and is substantially an alias, known as the Great Falls Power Company, which was incorporated in New Jersey in November, 1909, and as owners of the Southern Power Company sold to themselves as owners of the Great Falls Power Company the three hydroelectric power plants which had been erected by the Southern Power Company. To take care of the cost of developing this property the defendant power company placed a mortgage upon the same in the sum of $10,000,000, $7,000,000 of which has been sold and the plaintiffs allege was substantially the actual cost of the property thus purchased and developed. In addition to this bonded indebtedness, the Southern Power Company issued to themselves $6,000,000 of 7 per cent accumulative preferred stock, and $4,000,000 of common stock. The same interests, and substantially the same men, in organizing the Great Falls Power Company as the holding company for the hydroelectric generating property took over this part of the development of the defendant company and executed back a contract at the same time which provided that the Great Falls Power Company should furnish its hydroelectric current to the defendant for a long term of years at the rate of 4 mills per Kw. H., and as a part of this transaction the defendant Southern Power Company guaranteed to hold the Great Falls Power Company free and clear of any liability under the mortgage; that the defendant company, acting for itself, and the same interest also acting for the Great Falls Power Company, required the company to issue $5,768,800 of 7 per cent accumulative preferred stock, and also $5,768,800 common stock, which said stock was substantially all turned over to the defendant Southern Power Company and its promoters, who now own the same. About 1 June, 1915, the defendant company offered for sale in the city of New York, through the National City Bank of that city, the $7,000,000 of bonds secured by first mortgage upon defendant's property, and the vice president of the defendant company, W. S. Lee, who was also vice president of the Great Falls Power Company, stated in a public letter, which was published at that date in a circular by the National City Bank, that the earnings of the defendant company, as officially reported for the year ending 30 April, 1915, were as follows:

Gross receipts	$2,485,789.79
Operating expenses (including taxes and rentals)	1,111,016.97
Net earnings	1,374,772.82
Annual interest on bonded indebtedness	350,000.00
Balance	$1,024,772.82

And immediately thereafter this statement was made: "The net earnings for the year ending 30 April, 1915, were almost four times the interest requirements of the $7,000,000 first mortgage bonds which will shortly be outstanding."

The plaintiffs aver, on what they claim sufficient and reliable evidence, that the company's net earnings in 1917 were in excess of $2,000,000, while the interest paid on the bonded indebtedness, much of which was water, had not increased at all, and that in 1915 its net profits applicable to dividends were over $1,000,000, and at that time, after paying 7 per cent on the 6,000,000 cumulative preferred stock (*i. e.*, $420,000), there was still left applicable to the $4,000,000 of common stock $604,000, a net profit of 15 per cent, and at present probably this amount has been greatly increased. The plaintiffs are not advised as to how much dividend the defendant's stock in its holding company, the Great Falls Power Company, is earning at selling to itself hydroelectric current at 4 mills per Kw. Hour, which the defendant company is reselling at discriminating prices to its different customers according to the object it has in view, which may be either to encourage or to destroy, and thereby acquire these different plants.

The plaintiff urges, among the instances of discrimination, the following:

1. That the defendant is supplying current to the Southern Public Utilities Company, which is a company engaged in precisely the same character of business as these plaintiffs under a long-term contract at a rate much less than that charged and demanded of the plaintiff.

2. The defendant supplies current to sundry cotton mills for power and lighting mill villages at rates much less than that charged and demanded of these plaintiffs.

3. The defendant supplies current and power to various towns and municipalities under a long-term contract at rates much less than that charged and demanded of these plaintiffs.

4. The defendant supplies current to sundry cotton mills, entered into since the declaration of war, and since the abnormal increase of coal, at a rate much less than that charged and demanded of these plaintiffs.

The above are substantially, somewhat condensed, the statements and allegations of the complaint, which must be taken as admitted, as this case is presented upon the demurrer *ore tenus* thereto of the defendant.

The court overruled the demurrer, and the defendant appealed.

Linn & Linn, Roberson, Dalton & Smith, Brooks, Sapp & Kelly for plaintiffs.

Cansler & Cansler, Osborne, Cocke & Robinson for defendant.

CLARK, C. J. By demurring *ore tenus,* "the defendant admits all of the allegations made by the plaintiffs, and if any part of the complaint presents facts sufficient for that purpose or can be gathered from it, under a liberal construction of its terms, the pleading will be sustained." *Hendrix v. R. R.,* 162 N. C., 15.

"Every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Brewer v. Wynne,* 154 N. C., 471.

In *Garrett v. Trotter,* 65 N. C., 432, *Pearson, C. J.,* says: "A defect in pleading is aided if the adverse party plead over to, or answer the defective pleading in such a manner that an omission or an informality therein is expressly or impliedly supplied or rendered formal or intelligible. . . . This principle commends itself so strongly by its good sense that it must be taken to underlie every system of procedure professing to aim at the furtherance of justice, and to put controversies upon their merits, and not allow actions to go off upon subtleties and refinements."

The facts in this case admitted, or not denied, are that:

1. The defendant Southern Power Company is a public-service corporation. As such, it is subject to the laws of North Carolina governing public utilities companies.

2. As such public-service company, and by virtue thereof only, it enjoys and exercises the right and power of eminent domain, and as a consequence must discharge its duties subject to public regulation of its rates and conduct, and *without discrimination in the facilities it extends, and the rates it charges, under the same or substantially similar conditions.*

3. The defendant has a monopoly of the hydroelectric power supply and the markets therefor in the territory through which its lines extend.

4. It has been engaged more than ten years past in selling hydroelectric current to this plaintiff, to be resold at retail to citizens at Salisbury, Spencer, and East Spencer, High Point and Greensboro, and also to the Southern Public Utilities Company (which the defendant substantially owns and controls), to be resold at Charlotte, Winston-Salem, and Reidsville, and other points, and is selling its current to the municipalities of Lincolnton, Shelby, and Newton, to be resold to their respective citizens, and its business has become affected with a public use, and is for that reason also subject to public regulation of its rates and conduct, which rates *cannot be discriminatory* under like conditions or at the same points.

5. In 1914 it filed a statement with the Corporation Commission, denying that the commission had any authority to require it to file a schedule of its rates or to promulgate rules and regulations governing

it, and expressly asserted this power to be in itself by saying: *"Each case must be treated on its peculiar circumstances, and the rates are subject to the reasonable rules and regulations of the company,"* thereby asserting its exemption from control of the law and its superiority to public regulation of its conduct or rates.

6. Exercising the power, thus boldly declared that it possesses free from any control by the public, it declines to sell power and current to any consumer for a less period than 5 years, and then only under the terms which it sees fit to offer under its assertion of absolute sovereignty and freedom from control by law.

7. If a purchaser declines to accept any contract it offers, it charges such other higher rate as it may deem proper, for instance, it is charging the plaintiff 18.8 mills for a current which costs it 4 mills, and which it is selling to others at Salisbury at 11 mills, and which it is selling to the municipality at that point at 10 mills per Kw. H.

8. The defendant has entered into a long-term contract, extending to 1944, to furnish power to the Southern Public Utilities Company (which it substantially owns) at a less rate than it will sell to the plaintiff or any municipality in this State.

9. In 1917 it entered into a contract with its subsidiary (or *alias*), the Southern Public Utilities Company, to resell power at Reidsville at a figure so low that said utilities company is reselling power at a lower rate than the defendant power company will sell at wholesale to the plaintiffs.

10. The defendant company sells current only when reduced to not below 2,300 volts, and is not engaged in the retail power business. It induced the plaintiffs to discontinue their steam plant and purchase current from it on the basis of 11 mills, knowing that the current and power was to be resold in Salisbury and other towns in which plaintiffs do business.

11. It offers to sell the plaintiff current and power to be retailed by it, if the defendant is allowed without regal restraint to fix the price and terms of the contract.

12. It pleads want of authority in the courts to compel it to furnish power to the plaintiff upon the ground that it must not be restricted from discrimination in its rates.

13. The defendant Southern Power Company purchases its current at 4 mills per Kw. H. under a long-term contract, but declines to allow the plaintiff to share in the water rate of 4 mills, and requires the plaintiffs to pay it 18.8 mills, or more than 470 per cent profit.

14. The defendant Southern Power Company seeks to justify its increase in rates by alleging that it is necessary to do so to earn any dividend on the capital invested. The bonds, common and preferred

stock outstanding against this property exceeds $28,000,000, and over half the stock it has issued, the plaintiff avers that it can show, was not issued for expense incurred and represents only inflation.

15. The large increase in price for power of nearly 100 per cent charged the plaintiff, *i. e.,* from 11 mills to 18.8 mills, has been applied only to the plaintiff. But in all cases it charges municipalities and other public utilities companies more for current and power than it charges its own subsidiary, the Southern Public Utilities Company, thereby pressing most heavily upon those least able to resist extortion, and who are for that reason most entitled to the aid of the State for its protection.

16. The properties and plant of the defendant Southern Power Company, and its affiliated and subsidiary companies, were acquired and the plants completed substantially prior to the declaration of war, and it is entitled to no increased charge by reason of the advance in coal and labor since that date by reason of the fact that the cost of its operations is based upon the employment of a very small number of employees, and it is entitled to earnings almost solely upon the capital invested in properties and plants which have not been largely increased.

17. Its current is received by it under a long-term contract, under which it has subcontracted to sell to its subsidiary, the Southern Public Utilities Company, until 1944, at a less rate than it charges any other consumer. It only pays 4 mills for this current, and the former rate of 11 mills (*i. e.,* 1 1/10 cents) to the plaintiff would seem more than sufficient for proper remuneration, being a profit of 275 per cent.

18. The public policy of the State and of the National Government, which has been expressed not only in its Constitution from the beginning, and has been recently more fully expressed in statutes against trusts, and by decisions in the U. S. Supreme Court, forbids that this enormous aggregation of capital, charging exorbitant rates as appears by its own admissions in this record, should have, as it explicitly claims, the unrestricted right to fix its own rates and to discriminate between its customers, as if it were a private individual dealing in a competitive market.

It is of the highest importance that these claims of the defendant Southern Power Company to discriminate in the rates charged by it to purchasers under like conditions should be clearly denied by the courts. If the defendant is thus permitted to charge cotton mills in which the owners of the defendant are interested the rate of 11 mills, while it charges the plaintiffs and others mills and industries in which it is not interested 18.8 mills, or a higher rate than it does others in like condition, it follows that in a comparatively brief time the defendant will have the power to destroy, and thereby acquire the ownership of all the other cotton mills and industrial plants in the State, and thus create a cotton mill monopoly wherever its lines extend, for by reason of the approaching exhaustion

of the coal mines and the interruption of their operations there can soon be left available for large industrial plants no other power than the monopolized water power of the State.

The counsel for the defendant, upon the argument, stressed the contention that both plaintiff and defendant being public-service companies, and authorized by their respective charters to generate, and sell to the public, electric current that plaintiff could not evade this duty and require the defendant to furnish it current and power to resell. This argument is plausible, but we think unsound and untenable upon the admitted facts in this record. The defendant's charter expressly authorizes it to sell current and power to other public utility companies for the purpose of resale. This charter power is not mandatory. Still, when the defendant elected to exercise this power, and ten years ago made a contract with the plaintiff, Salisbury & Spencer Railroad Company, to furnish current and power to be resold to the people of that city for the next succeeding ten years, and induced it to scrap its steam plant and to rely solely upon the defendant for its hydroelectric power, and thereafter made similar contracts with the other plaintiff, the North Carolina Public Service Company, for ten years for current to be resold in Greensboro and High Point, and contracted with its own subsidiary, the Southern Public Utilities Company, to furnish it current and power up to 1944, to be resold, it dedicated its property to this particular class of public use, and cannot discriminate in charge or service between the several members of this class, for this would be a license to discriminate among cotton mills as a class, furniture factories, etc.

Wyman on Public Service Corporations, sec. 10, says: "Those who conduct private enterprises may use many schemes, but those who offer public employment must not adopt any business policies which are anyways inconsistent with impartiality in discharge of their public duties."

It is well settled that the common-law obligation of equal and undiscriminating service clearly requires that the same charges shall be made to all consumers for the rendering of similar service. The Supreme Court of the United States, in *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S., 92, very fully discusses this doctrine, and in the course of its opinion says: "They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service rendered. As a consequence of this, all individuals have equal rights, both with respect to services and charges. . . . To affirm that a condition of things exist under which common carriers anywhere in the country engaged in any form of transportation are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling."

This obligation cannot be evaded, even though the purchaser of the current may be to some extent a competitor. This question is very fully discussed in *Postal Cable Telegraph Company v. Cumberland T. & T. Company,* 177 Fed., 726, *et seq.* The Court there says: "The portion of the sovereign power with which telephone companies are as common carriers endowed is likewise given them for the purpose of serving not merely part of the public, but all of the public; and all persons composing the public, even though they be, in a sense, competitors, are entitled to use their privileges upon equal terms, and 'have equal rights both in respect to service and charge.'"

The Corporation Commission of California, in an opinion rendered 23 July, 1917, in the matter of the application of the Great Western Power Company, discussing the right of the power company to arbitrarily select its consumers, states "that the duties and obligations which it has undertaken do not contemplate the right on its part to select the consumers it will serve"; and further says: "It is clearly the duty of the public utility, situated as is the petitioner, to supply every reasonable demand for service at nondiscriminatory rates, and under just terms and conditions. Nor can this duty be avoided, modified, or abridged in any manner whatsoever, either by contract between the utility and any private interest or by the maintenance of unsuitable facilities. . . . In case of a temporary insufficient supply of electric energy to meet all reasonable demands in the territory which petitioner has elected to serve, the available supply will, of course, be prorated upon an equitable basis, consideration being given to the necessities of the public, irrespective whether or not these necessities arise directly or through the medium of another utility."

The foregoing is a just and reasonable statement of the common-law obligations resting upon public utility companies such as the defendant.

It appears from the investigation made by Congress into the water power of the country that 94 per cent of the water power of this State has been acquired by corporations which are either already owned or can soon be acquired by the Southern Power Company, or made subsidiary by the use of the same method of underbidding, and afterwards acquiring competitive plants, by which means the American Tobacco Company and the Standard Oil Company acquired the monopolies which since have been to some extent abated by the courts in pursuance of the action of Congress taken at the demand of a sound and overwhelming public opinion.

The methods being used by the defendant company by discrimination in the prices to consumers is identical with that which built up the Standard Oil Company, the American Tobacco Company, and other

great trusts which came under the ban of Congressional enactment, and which were condemned by decisions of the U. S. Supreme Court and by decrees of dissolution.

The control of the defendant corporation is by the same men who organized the American Tobacco Company, which was ordered dissolved in the case of *U. S. v. American Tobacco Co.*, 221 U. S., 106 (October Term, 1910), in which the U. S. Supreme Court, in an opinion by *Chief Justice White,* held that J. B. Duke, the president of the Tobacco trust, and the president of this defendant company, was individually responsible for the violations of law committed by that concern. The Court, in that opinion, speaking of the unlawful practices which were identical in all points with those in this case, as charged in the complaint, and admitted by the demurrer, recited the many facts which it held proven (p. 182) "by the ever present manifestation which is exhibited of a *conscious wrong doing* by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another, or in several, so as to obscure the result actually attained, nevertheless uniform in their manifestations of the purpose to restrain others, and to monopolize and retain power in the hands of the few, who it would seem, from the beginning contemplated the mastery of the trade, which practically followed. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations, serving as perpetual barriers to the entry of others in the tobacco trade."

The Court further says (p. 181) of that combination and monopoly: "The history of the combination is replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning, of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out, upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible." The above paragraphs were repeated and concurred in by *Judge Harlan* (pp. 189, 190) as "undoubtedly" a just "characterization of this monster combination." No judge dissented.

The story of high finance and monopoly record, as shown in that case, is displayed along the same lines in this present enterprise. In 1905 the same J. B. Duke and his associates, as disclosed by the undisputed facts in this record, incorporated the defendant company in New Jersey, in which State the American Tobacco Company and its subsidiary com-

panies, or *aliases,* were chartered. The defendant company acquired water rights and built power plants on the Catawba and Broad rivers in South Carolina. Afterwards the same Duke and associates organized the Great Falls Power Company, also chartered in New Jersey in 1907, and as owners of the Southern Power Company, on 1 March, 1910, sold to themselves, as owners of the Great Falls Power Company, the three hydroelectric plants which had been erected by the Southern Power Company. To take care of the cost of developing this property, the owners and promoters of the defendant power company placed a mortgage upon the same in the sum of $10,000,000, which it is alleged is substantially the cost of the property purchased and developed. In addition, they issued to themselves $6,000,000 of 7 per cent cumulative preferred stock and $4,000,000 of common stock, and substantially the same interest and men organizing the Great Falls Power Company as the holding company for the hydroelectric generating properties, took over its part of the defendant company, and immediately executed back a contract which provides that the Great Falls Power Company shall furnish its hydroelectric current to the defendant for a long term of years at the rate of 4 mills per Kw. H. The defendant company and its promoters, acting for themselves and for the Great Falls Power Company, caused the latter company to issue $5,768,800 of 7 per cent cumulative preferred stock, and also $5,768,800 common stock, which said stock was substantially all turned over to the defendant company and its promoters, who now own the same. Thereafter the same J. B. Duke and associates organized a subsidiary retail company, known as the Southern Public Utilities Company, which was principally owned by himself and immediate family and controlled by him. The company acquired a monopoly of the retail electric power business in Charlotte, Winston-Salem, and Reidsville, the latter under methods discussed in *Allen v. Reidsville,* 178 N. C., 513, 527-537. Thus these two corporations, under the same control, monopolized the wholesale supply of current and the retail distribution of same wherever a subsidiary company could get control of the municipal franchises. It is unnecessary to trace the transactions of this company in all its manifestations, but enough has appeared to show that the existence and operation of a water power monopoly with power to discriminate in its rates would be a menace which neither the courts nor the public can disregard.

The object of this action is not to declare or fix rates; nor is it to have the rates declared exorbitant, however clearly this may appear, but to prevent that discrimination between the purchasers of its power, which is a method by which the Standard Oil Company, the American Tobacco Company, and all other trusts have crushed opposition and enlarged their power and increased their accumulations to a point which made

them a menace to government by the people, and caused their dissolution by judicial decree. *Griffin v. Water Co.,* 122 N. C., 209.

The argument is presented that even though an unlawful discrimination in rates exists, still the courts are without power or procedure to correct the evil. Such judicial impotency does not exist in North Carolina. This Court, in the *R. R. Discrimination cases,* 136 N. C., 479, and 141 N. C., 171, established the rule and procedure by which such question should be determined. *Justice Connor,* speaking for the Court in the latter case, says: "However the courts construe statutes making penal or criminal a violation of the equality of right, when we come to deal with the question, in the enforcement of the civil right of the citizen, we must construe the law so that the right is secured and the remedy for its infringement given. This is the keynote of the decisions both in England and this country."

It will not be difficult for the Court, upon the hearing, to determine the lowest rate charged by the defendant for current and power furnished cotton mills, factories, municipalities, or other public-service companies, under the same or substantially similar conditions. The lowest rate thus established will automatically become the proper rate to be charged the plaintiffs for such service. Otherwise, the defendant will still be unlawfully discriminating against the plaintiffs.

The remedy sought here by a mandamus to compel the defendant company to concede to the plaintiffs the same rates that it grants to others, especially to its subsidiary companies, is the proper one, as stated by *Allen, J.,* in *Walls v. Strickland,* 174 N. C., 299, which was to compel a telephone public-service company to discharge its duties impartially and without discrimination. The defendant in that case pursued exactly the same course as in this in regard to the jurisdiction of the Court, and "excepted and appealed upon the ground that telephone companies being subject to the control and regulation of the Corporation Commission, the courts have no jurisdiction of the action."

In that case *Judge Allen* said: "The error in the position of the defendants is in failing to distinguish between the regulation and control of telephone companies, which, as to individuals and corporations, are committed by statute to the Corporation Commission (Rev., 1096; ch. 966, Laws 1907), whether exclusively so or not we need not say, and the refusal to perform a duty to the plaintiff, arising upon facts that are established. If the duty exists upon the facts found, there is nothing for the Corporation Commission to hear and investigate, and it only remains for the courts to compel performance of the duty.

"The question was considered in *Godwin v. Tel. Co.,* 136 N. C., 259, prior to the amendment of 1907, it is true, but when, as said in the opinion, telephone companies were placed by the Corporation Commis-

sion Act on the same footing as to public uses as railroads, it was then held that telephone companies, serving the public, must discharge their duties impartially and without discrimination, and that the writ of mandamus, issued by the courts, was the proper remedy to enforce the performance of the duty. . . . This case was approved in *Tel. Co. v. Tel. Co.*, 159 N. C., 16, decided after the amendments of 1907, and the jurisdiction to enforce performance of a duty by mandamus was recognized and exercised."

In *Tel. Co. v. Tel. Co.*, 159 N. C., 11, *Hoke, J.*, said: "In regard to the form of remedy available where, as in this State, the same Court is vested with both legal and equitable jurisdiction, there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction, the former being permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter being confined usually to causes of an equitable nature and in the enforcement of rights which solely concern individuals. High on Injunctions (4 ed.), sec. 2. Owing to the public interests involved in controversies of this character, it is generally held that mandamus may be properly resorted to. *Mayhan v. Telephone Co.*, 132 Md., 242; *Yancy v. Telephone Co.*, 81 Ark., 486; *Godwin v. Tel. Co.*, 136 N. C., 258."

The defendant asserts that it has a right to select customers to whom it will sell current and power, and to discriminate at will as to its prices. To this it may be said:

First. The General Assembly declares "all water power, hydroelectric power, and water companies now doing business in this State, whether organized under general or private laws of this State, or under the laws of any other State or county, shall be deemed to be public-service companies and subject to the laws of this State regulating public-service corporations." The enactment of this statute was procured by foreign water power companies, for by Rev., 3060, and 2575, this State, like most, if not all others, denied the right of eminent domain except to companies chartered by this State.

Second. It enjoys the privileges and has accepted the benefits of the right of eminent domain, and hence is subject to public control. *Griffin v. Water Co.*, 122 N. C., 206.

Third. It has expressly devoted its property to the public use over a period of ten years by connecting its lines with and furnishing electric current and power to other public-service corporations, as well as to the plaintiff, and to municipalities, with a knowledge that the current so purchased was being resold for the benefit of the inhabitants of the various cities, and its property has therefore become affected with a public use.

Fourth. It enjoys a monopoly of the hydroelectric business at Salisbury and in Western North Carolina.

Suppose a railroad corporation should have the power at will to charge one set of merchants at a given town a higher freight rate than it charges others under like conditions, how long would it be before those charged the higher price would be forced out of business? Yet a railroad is by no means as much a monopoly as the Southern Power Company, for in many towns there are competing railroads, but in this case it appears by the averments of the complaint, which are admitted by the demurrer, that throughout the territory where the defendant operates there is no other hydroelectric power, and that plants operated by coal cannot compete in prices.

At the same point and under like conditions the defendant must make the same charges to all alike. It is only on these terms that a monopoly is endurable at all. If it has not enough power at any one point for all applicants, it is its duty to give "miller's turn," that is, to furnish water power for heat and lighting in the order in which the applicants apply for contracts and at the same price to all whom it furnishes.

That hydroelectric companies must furnish at the same price all parties without discrimination, under like conditions, is held in *Water Works Co. v. Brown,* an Alabama case which is reported 1915 D (L. R. A), 1086, with copious notes, all of which are to that purport.

Mandamus is the proper and only remedy to compel the defendant to continue to furnish power and light to the plaintiff company on the same terms that it is furnishing others under like condition.

The real point in this case is not whether the rates charged any one are exorbitant, nor is it sought to have the rates fixed by the courts. The sole object of this proceeding is to forbid discrimination between purchasers in like conditions.

But as much was said in the argument and in the pleadings as to the charges, it may be well to translate into every-day language the rates set out in the pleadings and in the arguments:

One thousand watts is a kilowatt, and 1,000 watts an hour is a kilowatt hour, or Kw. H. The rate of 4 mills per Kw. H. (at which the Southern Power Company obtains its current from its subsidiary company, the Great Falls Company) amounts to nearly 3 mills per horse power per hour. A horse power is 746 watts, or roughly, three-fourths of a kilowatt.

The rate of 11 mills per Kw. H., at which the defendant had been reselling its power to the plaintiff, and is still selling it to many other companies, is 8.21 per h. p. per hour, a profit of about 275 per cent.

The rate of 1.88 cents, at which the defendant now offers to sell its

power and current to the plaintiff is 1.40 cents per h. p. per hour, or a profit of nearly 470 per cent.

The rate of 15 cents (*i. e.*, 150 mills) per Kw. H., at which some local companies resell to the individual consumer, amounts to 11 1/5 cents per h. p. per hour, which is a profit by the latter of 800 per cent, as alleged in defendant's answer.

As the Great Falls Company must make a profit to pay its interest and dividends when it sells to the Southern Power Company at 4 mills, it must follow that there is an almost incalculable profit taken out of the public between the actual cost of the power produced by the Great Falls Company and sold to the Southern Power Company with a profit, at the figure of 4 mills, and the 11 1/5 cents, or 112 mills per h. p. per hour charged consumers of the lights in the towns when they pay 15 cents per kilowatt per hour, or 11 1/5 cents per h. p. per hour. The current when used by the consumer at his home in the city will cost approximately 37½ times the original 4 mills per kilowatt (which is 3 mills per h. p. hour) paid by the defendant Southern Power Company to the Great Falls Company, its subsidiary company, and the Great Falls Company out of the price which it charges the Southern Power Company has then already made a big profit, out of which to pay interest and dividends on its heavily watered stock and bonds.

The great profit made by the initial company in generating power is nowhere better proven, aside from the allegations in the complaint and answer in this case, than in the recent report on the water power hearing in Congress, which shows that in Canada, under the reforms instituted by government in restricting the profits, water power and lights are now furnished at 1⅓ cents per Kw. H. (kilowatt hour) to consumers, instead of 15 cents, which is the rate many consumers in this State are now paying for lights and power from the local light and power company. The answer of the defendant in this case claims that the plaintiff and other similar companies are reselling to their patrons at 800 per cent profit over the price they are paying to the defendant. It is but fair to say, however, that the local companies have very heavy expenses necessarily, and whether the 800 per cent advance on the prices they are paying is unreasonable or not does not arise in this case. The allegation is not proven and is not admitted by demurrer or otherwise. But if true, the remedy is by application to the Corporation Commission to fix reasonable rates. Extortion by the plaintiff, if shown, will not justify discrimination by the defendant.

As the defendant claims that it must advance its price to the plaintiff beyond the 11 mills which it has been charging to the plaintiff, and which is 275 per cent over what it pays the Great Falls Company, and claims therefore that it must increase its charge to the plaintiff to 18.8 mills

(which is 470 per cent of the cost to it of the power), it is proper to observe that the operations of the defendant Southern Power Company does not call relatively for so large a number of men or other expenses, and that at the charge to the plaintiff of 1.1 (*i. e.*, 11 mills) it is shown that it has paid large dividends on its greatly inflated stock and bonds.

If the profits, which it clearly appears are taken out of the public by the defendant and its subsidiary companies, are possible now, what will be the result if this enormous and steadily growing aggregation of wealth were permitted to charge its own rates, as it claims it has a right to do, without supervision by governmental authority, and has full power to discriminate against those municipal and industrial plants and factories which it may desire to crush out and buy? There must be considered, too, that with the constantly decreasing competition from the coal supply, which must be conserved to prevent exhaustion, and which is so frequently interrupted by strikes, the power the defendant claims of unrestricted rates and of absolute right to discriminate between purchasers would make it a despotism beyond a parallel in history.

It must be remembered that the men who are organizing this mighty power and moving on to their consummation are the same who organized the American Tobacco Company, with a capital of $350,000, and in a few years made it into a combination of $350,000,000, *i. e.*, $1,000 for every $1 they claimed to have put in, and that the Congress and the Supreme Court of the United States were forced to take hold and cause its dissolution as an enemy of the Republic. The history of that movement and the names of the men indicted, 29 in number, among them the leaders in this organization, are set out in the *United States v. American Tobacco Co.*, quoted above, and more than one of the leaders in this movement appear also as defendants in the proceedings to dissolve the Standard Oil Company, which is reported in the same volume (221 U. S.) of the United States Supreme Court Reports.

The highest considerations of the public welfare require that the rates of this company and their subsidiaries, and the rates of those who, like the plaintiff, resell the current for light and power, shall be strictly supervised and reduced to a reasonable profit.

But, as already said above, the sole question in this case is not what is a reasonable rate, nor are the courts called upon to fix the rate (not in the first instance at least), but shall the defendant be required to sell its current and power to all alike, without discrimination in prices, when under like conditions. The court below properly overruled the demurrer.

Affirmed.

BROWN, J., concurring: It is admitted in plaintiff's brief that this action is not brought for the purpose of asking the Court to regulate

and fix the schedule of rates which the defendant company charges consumers, but for the sole purpose of compelling the defendant to continue to furnish plaintiffs current, and to do so without discrimination for like service to consumers similarly situated.

The defendant filed an answer to the complaint and then demurred *ore tenus,* thereby admitting the truth of the facts stated in the complaint. Upon these facts I am of opinion that plaintiff is entitled to the relief demanded, and that mandamus is the proper remedy. I concur in the judgment of the Court overruling the demurrer and affirming the judgment of Judge Shaw.

ALLEN, J., dissenting: The principle announced in the opinion of the Court that corporations affected with a public use must serve the consumer impartially and without discrimination is not questioned, and it is a principle which should be rigidly enforced for the benefit of the public, but the questions presented by this appeal are altogether different.

The plaintiffs are not in my opinion consumers, and not within the protection of the principle, and no party to this action represents the man who must ultimately pay the profits of both plaintiff and defendant. The plaintiffs, the Public Service Company, is a corporation, with power in its charter to generate electricity and sell it to the public, and owns and operates the railway company, the other plaintiff, one being subsidiary to the other, following in large measure the methods of the American Tobacco Company and the Standard Oil Company, condemned by the Supreme Court of the United States.

The plaintiff has failed to exercise its powers, and for the last ten years, instead of generating its own electricity, as it had the right to do, has bought its power from the defendant and sold it to the consumer at a profit, stated to be 800 per cent, and this statement is practically undenied, thus introducing between the consumer and the source of power, the plaintiff, as middle-man, with all the attendant evils.

The contract with the defendant for service existing during the last ten years having expired, and being unable to agree upon a new contract, except at an increased rate, this action has been instituted in the Superior Court, and the prayer of the complaint is as follows:

"Wherefore, plaintiffs pray for a writ of mandamus against the defendant:

"1. To compel the defendant power company to furnish and to continue to furnish electric current and power from its substation at Salisbury to the plaintiffs for the use and benefit of the cities of Salisbury and Spencer and East Spencer, and the inhabitants thereof, as heretofore furnished by it.

"2. To compel the defendant power company to furnish such service, power, and current at uniform and reasonable rates and without discrimination for like service, under the same or substantially similar conditions."

I do not think the action can be maintained under these conditions for the following reasons:

1. If what is said of the defendants in the opinion of the Court is true, and if the plaintiffs have failed to exercise the powers conferred in their charters, as they admit, preferring to buy power from the defendant, which they sell to the consumer at a profit of 800 per cent, I do not think either party has any standing in court, and certainly the plaintiffs ought not to be aided by judicial decree to continue a business so hurtful to the public.

2. If the Court will inquire into the rights of the parties, and the defendant can be *compelled* to furnish power to the plaintiff at *any rate,* it gives the opportunity to destroy the chartered rights of the defendant, and to render it impossible for it to perform its duties to the public.

The plaintiff, seeing that it can avoid the expense of constructing and operating a plant, may enlarge its operations and make new demands on the defendant, or new corporations may be formed, with power to generate electricity and sell to the public, who, profiting by the example and experience of the plaintiff, will build no plants, but will demand power of the defendant on the same terms as the plaintiff, and in this way the operations of the defendant may be limited to furnishing power to competitive corporations.

3. The plaintiff is not entitled to protection as one of the general public, and cannot secure power from the defendant except by contract between the parties. So far from being one of the public, its position is antagonistic because it sells to the public, and it would seem at the highest rates.

The business in which the plaintiffs are engaged, and their service is not a dependent business or service, but is entirely independent. The plaintiffs are chartered and authorized to generate electricity as well as to distribute it, and it is as much their public duty to do one as it is to do the other, and the obligation to do each is the same. They have no right to rid themselves of either one of their public obligations by undertaking to pass either over to the defendant. They would have as much right to require some other company to distribute electricity for them as they have to require this company to generate electricity and sell it to them to be resold by them at a profit.

Express Co. v. R. R., 111 N. C., 463, is the leading case in this State. The proceeding was instituted before the Railroad Commission; and petitioner, express company, sought to compel certain railroads who

were made respondents, to furnish it with facilities for doing an express business the same as they were furnishing another express company, alleging that the railroads were discriminating against petitioner in furnishing such facilities to such other express company, while denying them to petitioner. Section 4 of the act constituting the commission provided: "That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Court, following the Supreme Court of the United States (*Express cases,* 117 U. S., 1), decided that neither at common law nor under the statute did the railroads owe any public duty to the express company to furnish it with the facilities demanded; that the public duty of the railroads was to serve the shipping and traveling public, and not another carrier; and that there was no discrimination against petitioner, because the railroads were furnishing facilities similar to those demanded by petitioner to another express company. The Court held that the furnishing of such facilities by the railroads to such other express company was a matter of special contract between them.

Chief Justice Shepherd, after citing authorities, says: "The controversy is solely between the respective corporations, and the real question is not whether the defendant railroad companies are authorized to do an express business for themselves, nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person especially appointed for that purpose, nor whether they shall carry express freight for the complainant company as they carry like freight for the general public, but whether it is their duty to furnish the complainant with facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company."

Again: "The defendants have not refused to act as common carriers, or to transport any article tendered by the complainant. They have refused to afford it facilities for carrying out an express business upon their roads, and this we have seen they had a right to do. In this refusal they were not guilty of making any discrimination or preference within the act of the Legislature. As we have seen, the Supreme Court of the United States has said that they are under no obligation to carry another company, and the mere fact that they are carrying another company does not amount to an unjust or unreasonable preference."

In the *Express cases,* 117 U. S., 1, certain express companies sought

to compel the railroad companies to give them the same facilities for their business furnished other express companies. The Court denied the application, saying, among other things: "The reason is obvious why special contracts in reference to this business are necessary," and then proceeds to show that if the railroads were compelled to yield to the demands of the plaintiffs that these might be increased until the railroads could not perform their duties to the public, a condition which may soon confront the defendant in this action.

The Court adds: "If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented," a remark very pertinent to the present controversy.

These authorities, in my opinion, cover the principle involved in this appeal, and are decisive against the plaintiff.

If the courts cannot compel railroads, which are public-service corporations, to give the same service to one express company that it gives to another, which is the decision of the Supreme Court of this State and of the United States, from what source, and by what course of reasoning can it be said that the courts have the power to require one electric company to furnish power to another electric company, its competitor in business, on terms similar to those given to others?

4. The purpose of the action is to fix the rates which the defendant shall charge the plaintiff, and this is primarily a legislative, not a judicial function, and is to be exercised by the Legislature itself, or by a commission acting under its authority.

That this is the purpose of the action is apparent from the whole scope of the pleadings, and the prayer for judgment, in which the Court is asked to compel the defendant to furnish service at reasonable rates.

Who is expected to say what rates are reasonable if not the Court? Certainly the plaintiff will not be permitted to say what the defendant shall charge, and it will not consent for the defendant to do so, and if neither of these, and the Court is not asked to do so, what practical result can follow this litigation?

In *Munn v. Illinois,* which is the leading authority on the power to deal with the rates of public-service corporations, the Court says: "It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

"As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the Legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly

speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the Legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable."

In *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.,* 230 U. S., 255: "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries, the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

The Supreme Court of Wisconsin, in *City of Madison v. Madison Gas and Electric Company,* 108 Northwestern, 65, in holding that the courts have no jurisdiction to fix rates, says: "This power of the State is in its nature legislative, and has always been exercised either directly by the legislative branch of the government or by delegation of it to municipal corporations or some other appropriate agency. Whether existing or prescribed rates and charges for a public service afford a reasonable compensation is a judicial question. In the very nature of the right to regulate these matters, between the public and those engaged in performing the service, it must follow that courts cannot prescribe a schedule of rates and charges as the prescribed quantum of compensation which is to be awarded for future services, because it is the legislative prerogative to make and prescribe the rules which shall regulate the relations between persons and their acts as they arise in the affairs of life. When, however, such rules have been enacted as law, then the judiciary is vested with the authority to construe and apply them to the affairs they were intended to regulate and control. These two functions which are recognized as distinct and separate in the fundamental organization of our Government are not to be encroached upon or curtailed by the other."

In this State the Legislature has taken charge of the question and has committed the power to fix rates to the Corporation Commission, and there is no reason for the courts to exercise this jurisdiction, which is not within their proper and legitimate functions.

Chapter 127, Laws 1913, provides: "Section 1. The Corporation Commission shall have such general power, control, and supervision of

all electric light, power, water, and gas companies and corporations, other than such as are municipally owned or conducted, and of all persons, companies, and corporations, other than municipal corporations, now or hereafter engaged in the business of furnishing electricity, electric light, current or power, and gas, as it now has over railroad and other corporations as set forth in chapter twenty of the Revisal of one thousand nine hundred and five, and the acts supplemental and amendatory thereof.

"Section 2. That the said commission shall have full power and authority to fix, establish and regulate the rates or charges of such persons, companies, or corporations, to make such investigations and orders, and establish and enforce rules, regulations, fines, and penalties as it has over railroads.

"Section 6. The Corporation Commission shall make reasonable and just rules and regulations:

"1. To prevent discrimination in furnishing electricity, electric light, current, power, or gas."

WALKER, J., concurs in this opinion.

J. F. THOMPSON ET AL. v. L. M. HUMPHREY ET AL.

(Filed 20 December, 1919.)

1. Wills—Estates—Contingent Remainders.

Where, by the terms of his will, the testator's intent is shown that the vesting of certain contingent interests shall be at the death of the first taker, it will control the general rule that they will best at the death of the testator.

2. Same—Vesting of Estates—Deeds and Conveyances—Trusts—Uses.

A testator devised to his wife during widowhood or until she remarry, the income from certain of his lands, with remainder to his children at her death or remarriage, who should then be twenty-one years of age, or in case of death of such child, his or her child or children surviving to take the part the deceased parent would have taken if living; and should the wife die before any of the testator's children reached the age of twenty-one, the executor shall collect the income and expend it for the testator's children, until they arrive at that age, turning over the shares of the others to them; and divide the whole property when all the children reached their majority, and giving all of them, upon arriving at age, "a voice in the management of the property embraced in the will": *Held*, the contingency upon which the interest of the children would vest would be at the death or remarriage of the wife, and the successive arrival at age of the living children, the title as to each until that time being a

defeasible fee, the grandchildren taking directly under the will, if they fall within its terms, and not by descent. *Hence*, before the death of the mother, holding the life interest, a valid conveyance of the fee-simple title cannot be made. The question of the limitation of fees to take effect alternately, etc., and the effect of the life tenant's deed as an estoppel, discussed by WALKER, J.

3. Judgments— Estoppel— Scope of Inquiry — Reference — Extraneous Findings—Actions—Quasi in Rem.

Where, under a will, the children and grandchildren of the testator take a defeasible fee in remainder after the death of the first taker, and after a receiver has been appointed by the court to manage the estate, action has been brought solely for the purpose of returning the residue, not disposed of, to the administrator with the will annexed, and a referee has been appointed for an accounting, his finding, approved by the judge, that the remaindermen acquired such estate in fee, is neither involved within the scope of the inquiry nor the issue, and cannot conclude the parties as to their actual title, especially where the grandchildren have not been made parties or represented by guardian. The principle by which a judgment *quasi in rem* may affect and conclude all persons, whether parties or not, distinguished by WALKER, J.

4. Same—Fee—Defeasible Fee—Consistent Findings.

In this case it is *Held*, where the children of the testator took a defeasible fee under his will, the referee's report upon an accounting of a former receiver, that the children took a remainder in fee is not inconsistent with the fact that they took a defeasible and not a fee simple absolute title.

CIVIL ACTION, heard by *Bryson, J.*, upon facts agreed, at September Term, 1919, of GUILFORD.

On 1 August, 1919, plaintiffs contracted to sell the land described in the case, and to convey a good and indefeasible title thereto, for the consideration stated. They tendered a deed for the same, and defendants refused to accept it upon the ground that plaintiffs could not convey such a title as is described in the contract, as they did not have an indefeasible title to the said land.

The controversy arose upon the following facts agreed:

1. At the time of his death, on 15 April, 1903, B. J. Fisher was the owner of the land above described, together with adjoining land and other real estate in said State and county, subject to certain incumbrances, which have since been discharged; and he left a last will and testament, which was afterwards duly probated, a copy of which is hereunto annexed, and asked to be taken as a part of this paragraph.

2. The executor named in the will did not qualify, but Isabella Fisher, widow of B. J. Fisher, qualified as administratrix with the will annexed, and continued to act in that capacity until 1904.

3. Early in the year 1904 a suit was instituted in the Superior Court of Guilford County for the purpose of having a receiver and commis-

sioner appointed to take charge of, manage, and control all the estate of B. J. Fisher, deceased. The entire record of that action is referred to, and made a part of this statement of the case, as fully as if herein set out. The Supreme Court affirmed the judgment of the Superior Court, as will appear by reference to the case, which is reported in 170 N. C., which judgment confirmed the report of the referee.

4. As will appear from the record in *Fisher et al. v. Fisher et al.*, the complaint of Isabella Fisher was filed and a guardian *ad litem* was appointed to represent the infant children, to wit: Olivia Maude Fisher, William R. G. Fisher, Elsie May Fisher, and Millicent Rosa Fisher; and a receiver and commissioner was appointed and acted in that capacity until the June Term, 1906, of the Superior Court, when he resigned and another person was appointed trustee to succeed him. From the year 1904 until the October Term of the court, 1914, all of the property and estate of B. J. Fisher, deceased, including the property in controversy, was held, managed, and controlled by the receiver and trustee under the immediate direction and orders of the court.

5. On 28 February, 1914, Olivia Maude Fisher and William R. G. Fisher, two of the children named in the will of said B. J. Fisher, filed a petition or complaint in said action then pending in the Superior Court of Guilford County, in which they alleged that they and their sister, Millicent Rosa Fisher (then a minor), were the owners of the property described above, and other property of the Fisher estate, subject to the life estate of their mother, Isabella Fisher; the petition further asked for an accounting by the trustee; that the trustee be removed, and that the children be placed in control of the property. Upon the filing of the petition, a guardian *ad litem* was appointed for Millicent Rosa Fisher, infant defendant, and one of the class of remaindermen under the will of B. J. Fisher, and the guardian *ad litem* filed an answer, which is shown in the printed record of such case.

6. Thereafter a referee was appointed, who filed his report, which is fully set out in the printed record. In his conclusions of law are the following:

"Under and by virtue of the terms of the last will and testament of B. J. Fisher, deceased, Isabella Fisher was devised a life estate in all the property of B. J. Fisher in America, both real and personal, with the use and disposal of all moneys accruing annually, to have and enjoy the same during her life or widowhood. The petitioners, Olivia Maude Fisher, William Randolph Grover Fisher, and Millicent Rosa Fisher are the owners in fee of said estate, subject to the rights and estate of the said Isabella Fisher."

7. At the October Term, 1914, of the Superior Court the judge signed an order, or judgment, which provided, among other things:

"C. A. Bray, as trustee, may be relieved of any further responsibility as such trustee, upon turning over and transferring to Isabella Fisher, administratrix *cum annexo testamento* of B. J. Fisher, Isabella Fisher individually, Olivia Maude Fisher, and W. R. G. Fisher, all of said property and effects now in the hands of such trustees belonging to said estate."

8. At the March Term, 1915, of the Superior Court, exceptions to the report of the referee were heard and judgment entered, which provided, among other things, as follows:

"It is therefore ordered, adjudged, and decreed that all the exceptions filed by defendants be, and the same are hereby, overruled, and the findings of fact and conclusions of law of the said referee be, and the same are hereby, in all respects confirmed."

9. From the judgment confirming the report of the referee there was an appeal to the Supreme Court of this State, in which the entire record went to said Court, and after reviewing the case, the Court delivered its opinion, which is set out in 170 N. C., 378, and made a part of this case.

10. Elsie May Fisher, one of the children of B. J. Fisher, named in his will, died before reaching the age of 21 years, and never married; Millicent Fisher reached the age of 21 about the time, or soon after the time, the litigation hereinbefore referred to was concluded. Isabella Fisher, widow of B. J. Fisher, is now 60 years or more of age; Olivia Maude Fisher is about 35 years of age; William R. G. Fisher is about 28 years of age, and Millicent Rosa Fisher is about 24 years of age.

The defect in the title of plaintiffs is alleged to arise out of the provisions in the will of B. J. Fisher, the material part of which is as follows, the paragraphs being renumbered:

"1. I give, devise, and bequeath to my daughter, Lillian Brenda Fisher, of Chester House, Wellingboro, Northampton, England, all my property of all kinds and description, in Great Brittain, in fee simple absolutely.

"2. I give, devise, and bequeath to my beloved wife, Isabella Fisher, all my property in America, both real and personal, to her use and disposal all moneys accruing annually, to use and enjoy the same during her life, if she shall so long continue my widow, and from and after her decease, or second marriage (whichever shall first happen), all her interest in my estate shall cease and be forever lost.

"3. At the death or remarriage of my wife, Isabella Fisher, my will and desire is that all my property in America be divided equally between my children, to wit: Olivia Maude, Elsie May, William Randolph Grover, Millicent Rosa, provided, they have arrived at the age of 21 years, or if any of my said children have married and died, leaving sur-

viving a child or children, it or they to have that portion which would have fallen to its mother or father (as the case may be) had he or she been living.

"4. In the event of the death of my wife, as aforesaid, before the children arrive at the age of 21 years, then the whole of my property is to go into the hands of my executor hereinafter named, and he shall collect all moneys and interest, and shall expend them for the use and benefit of my children as aforesaid, who are under the age of 21 years, but shall hand over to those over the age of 21 years that division to which they are entitled of annual interest.

"5. All moneys not applying or necessary to be spent for my children under 21 years to be invested in United States Government securities for all my said children, and when all have arrived at the age of 21, then this general fund and all other properties to be divided between my said children, and by themselves, so that each shall have an equal share of my estate.

"6. That each child, when it arrives at the age of 21 years, shall have a voice in the management of the property embraced in this will, and after two of them have arrived at the age of 21, then these two, in the event of disagreement with my executor or administrator *de bonis non* with the will annexed, shall have full power to remove said administrator with the will annexed, and shall have power to appoint another administrator, and the former shall cease to have any further interest or management of said property."

There was no objection to the form of the deed tendered by the plaintiffs, or to its sufficiency to pass whatever title the plaintiffs had, but the only contention is that their title, as conveyed by the deed, is defective, and is not indefeasible.

The court gave judgment against the plaintiffs, and they appealed.

F. P. Hobgood, Jr., Brooks, Sapp & Kelly, and Charles A. Hines for plaintiffs.

Roger W. Harrison for defendants.

WALKER, J., after stating the case as above: The proper construction of this will is that Mrs. Fisher should have the estate for her life or widowhood, and at her death, or remarriage, it should go to her children, provided they have then arrived at the age of twenty-one years, and any one of them who has attained that age shall have his, or her, share ("or division") of annual interest, or income, and, as to those under age, their shares shall be held by the executor, for the purpose of being expended by him for their use and benefit. As each becomes of age, he or she shall have a voice in the management of the property, etc.,

but when all have attained the age of twenty-one years, there shall be a general division among them, "and by themselves," if the widow is dead or remarried, so that each shall have an equal share of the testator's estate.

Defendant contends that the defect in the plaintiff's title arises out of the provision that if any one of his children has married, and died, leaving a child or children surviving, "it or they to have that portion which would have fallen to its mother or father (as the case may be) had he or she been living." The widow is still living, without having remarried.

Plaintiffs contend that an estate in fee was vested in Mr. Fisher's children absolutely, and indefeasibly, when the testator died, or, at the latest, when the youngest child, Millicent Rosa Fisher, came of age, and that if this is not the true meaning, such an estate was vested by force of the proceedings and judgment in the case of *Fisher et al. v. Fisher et al.*, above mentioned, because the very question was so adjudicated therein, and the judgment is conclusive, in that respect, as a *quasi judgment in rem,* upon the whole world.

Defendant contends that it did not so vest until the time for the division, that is until the death or remarriage of the widow, and the coming of age of all the children, and that, until the happening of both events, it cannot be determined whether Mr. Fisher's children, or his grandchildren, will take under the will. The plaintiffs contend that the material part of the third item of the will should be construed as if it read: "Provided, they have arrived at the age of twenty-one years, or, if any of my said children have married and died *before arriving at the age of twenty-one years,* leaving surviving a child or children, it or they to have that portion which would have fallen to its father or mother," etc.; and defendants contend that it should be construed as if it read: "Provided they have arrived at the age of twenty-one years, or, if any of my said children have married, or died *before the time of division,* leaving surviving a child or children, it or they to have that portion which would have fallen to its mother or father," etc. The difference is in the words italicized.

We will first undertake to construe the will, and then take up the question as to the effect in law of the former judgment.

As between the two views, we are of the opinion that the defendants' is the correct one. It will be perceived, that the division is not to take place until the death, or remarriage, of the widow, and the proviso to section 3 clearly refers to that, as the time when the estate is to vest, and not to the death of the testator, for that section says that the property shall be divided equally between the children (naming them) at the widow's death, or remarriage, provided, first, that they are then

twenty-one years old, "or if any of them have married and died, leaving surviving a child or children, it or they to have that portion which would have fallen to its mother or father (as the case may be) had he or she been living." The two provisions in regard to the arrival at full age of the children, and the death of a child, refer to the same event, namely, the death or remarriage of the widow. The will also declares that if, at the death of his widow, all the children are not of age, the division shall not take place until they are, with provision, in the meantime, for collecting and paying their share of the income to those who are of age and holding the balance, and paying it out, for the use and benefit of those under age. "All the property, both real and personal in America," was devised and bequeathed to the wife, the exact language being, "to her (the wife's) use and disposal, all moneys accruing annually to use and enjoy the same during her life, if she shall so long continue my widow." He evidently did not intend by this provision that the childrens' estate in remainder should vest absolutely until his widow's death, or remarriage, when it could be ascertained whether all of them had survived her, or some had died, in her lifetime, "leaving children surviving." Whether, therefore, children or grandchildren would take under the will was not to be determined, at the earliest, until the widow's death or remarriage. It could not have been intended that an estate in remainder should vest absolutely in the children during the life of the wife or before her remarriage, even though they had arrived at full age, as the wife was to have the property and the use thereof during her life, or before her remarriage. The children might not attain full age before the widow's death, or remarriage. He directs that at the death or remarriage of his widow the property shall be equally divided among his children, if *then* of age, the child of any deceased child to represent its parent. All these provisions would seem clearly to exclude the idea that his children were to have an indefeasible estate until his wife's death or remarriage. The arrival of the children at their majority was referred to as the time for them to enjoy their estate in possession, and not necessarily for its vesting in interest. If the widow had remarried, or died, and the children had arrived at full age, the two events would have occurred upon which the estate was intended to vest absolutely in interest and possession. The provision as to the time when all the children should arrive at full age was merely to determine when, after their mother's death or remarriage, the general division should take place, and they should receive the actual possession of the property. It clearly was not intended to fix the time when their estates should become absolute and indefeasible, regardless of whether their mother was then living. It will be easily deduced from this construction that the children may eventually cease to have any interest, and that even if

they marry and have children, some of them may not survive their parents, and only those who do survive them and the widow will take under the will, in the place of their parents. The construction of the will makes the estate of the children a defeasible fee, for they may never take, as the mother may survive all of them, in which event their children would take in their places, and then, not by descent from them, as in *Whitfield v. Garris,* 134 N. C., 24, but directly from the devisor, under his will, as purchasers.

This case is controlled by what is said in *Jenkins v. Lambeth,* 172 N. C., 466, that the general rule as to when the heirs of the testator who are to take must be ascertained, the rule being that it must be done as of the time of his death, may be modified by the terms of the will indicating a different time, and that they must be ascertained at the termination of the life estate, if the language shows such to have been the intention. *Harrell v. Hagan,* 147 N. C., 113; *Rees v. Williams,* 164 N. C., 132, and cases there cited. The general rule just mentioned is not one of substantive law, like, for instance, the rule in *Shelley's case,* but one of interpretation or construction, as some other rules are, which were adopted as aides to us in determining the true will and intention of the testator. *Jenkins v. Lambeth, supra; Heard v. Read,* 169 Mass., 216. As said in the *Jenkins case,* the general rule will yield when, construed by accepted principles, the intent and meaning of the instrument is to clearly postpone the time for ascertainment of the heirs to a later period. And further it was said: "The deed, then, by its terms and meaning having fixed upon the death of the life tenant as the time when the heirs of the grantor should be ascertained, under our authorities his Honor was right in holding that the limitation is still a contingent one, the person to take being uncertain," citing *Rees v. Williams,* 164 N. C., 128 (*S. c.,* 165 N. C., 201); *Latham v. Lumber Co.,* 139 N. C., 9; *Bowen v. Hackney,* 136 N. C., 187; *Hunt v. Hall,* 37 Me., 363 (also cited in *Bowen v. Hackney, supra*), and Fearne on Cont. Rem., Class 4. Whether this is a contingent remainder, or executory devise, or a vested remainder subject to be divested upon a condition subsequent, the result will be the same, viz., that the children of Mrs. Fisher cannot, by deed, alien the property freed from the contingency by which their estate may be divested. *Pendleton v. Williams,* 175 N. C., at 253, citing the authorities sustaining that proposition. See, also, *Bowen v. Hackney, supra.* But it seems to us that *Bowen v. Hackney, supra,* although not altogether like this case, so nearly resembles it as to be an authority in favor of our construction of this will. We there said: "It can make no difference in this case whether the remainder to each child was contingent or vested, but subject to be divested by its death before that of the life tenant. If the remainder to the children of the testator at the death

of their mother is not contingent, it can only be vested, subject to be divested as to any child who predeceased the mother, for it was surely intended that the representatives of any deceased child should take, not by descent but by purchase, that is, nothing from the parent, but all from the devisor."

And the case of *Hunt v. Hall,* 37 Me., 363 (cited in *Bowen's case*), is more especially applicable, as the terms of the will in that case were strikingly like those of the Fisher will we are construing. The limitation there was "after the decease of my dear wife my will is that my executors hereinafter named cause an equal division to be made among all my children and the heirs of such as may then be deceased." With reference to this devise that Court said: "The persons who are to take are not those who are living at the death of the ancestor. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator an heir might convey by deed his share of the estate, and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided among the children and the heirs of such as may then be deceased. Till then there is a contingency as to the persons who may take the estate." The only distinction between the two cases, though they are not anywise different, is the substitution of the word "heirs" for the word "children." The limitation in *Whitesides v. Cooper,* 115 N. C., 570, was not materially different from the one under consideration, bearing in mind what we have before said, that it makes no difference whether the estate here is contingent or is vested, but subject to be divested upon the happening of a specified event. The limitation in *Whitesides v. Cooper* was: "At the death of my wife the said plantation, with all its rights and interests, I bequeath and devise to our seven sons (naming them), or such of them as may be living at their mother's death, and to their heirs, share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share in each and every such case." In that case the Court cited *Starnes v. Hill,* 112 N. C., 1; *Watson v. Watson,* 56 N. C., 400; *Williams v. Hassell,* 74 N. C., 434; *Young v. Young,* 97 N. C., 132; *Miller ex parte,* 90 N. C., 625, and *Watson v. Smith,* 110 N. C., 6, to sustain its ruling and as authority for the position that where "the contingent remainders limited on the termination of the life estate are to such of her children as are then living, and to the then living issue of such as have died leaving issue, it is impossible to tell who will be entitled when the life tenant dies."

Speaking of the limitations of fees which take effect alternatively, or as substitutes one for the other, Mr. Fearne (3 Am. Ed.), 373, says: "However, we are to remember that although a fee cannot, in conveyances at common law, be limited on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere, but so that one only take effect, and every subsequent limitation be a disposition constituted in the room of the former, if the former should fail in effect."

And further he says: "But at this day, such limitations may be good in a will or by way of use upon a contingency that may happen within a reasonable period; though this not by way of direct remainder, but by way of executory devise, or springing or shifting executory use." Fearne, p. 373. See, also, *Smith v. Brisson,* 90 N. C., 284, where *Justice Ashe,* in discussing very ably and learnedly the doctrine of shifting uses, says: "It was under this doctrine of a shifting use that it has been held since very early after the statute of uses, that a fee simple may be limited after a fee simple, either by deed or will; if by deed, it is a conditional limitation; if by will, it is an executory devise. And in both these cases a fee may be limited after a fee," citing 2 Blackstone Com., 235.

In this connection, and as bearing upon the question that the children of a deceased child of Mrs. Fisher, who survived their parent, would not be bound by such deceased child's deed, because the surviving children of any deceased child would not claim under its parent, but under the will of the devisor. See *Whitesides v. Cooper, supra,* 570-577; *Starnes v. Hill, supra,* at 13 and 26; *Moore v. Parker,* 34 N. C., 121.

Chief Justice Shepherd says, in *Starnes v. Hill, supra,* at p. 13: "We are therefore of the opinion that R. O. Patterson took but a contingent remainder, and that until the happening of the contingency, the rule in *Shelley's case* could not operate so as to defeat the contingent remainders of his heirs as purchasers. Granting, however, that the limitation could possibly be construed to vest in him a present interest so as to put in operation the rule in *Shelley's case,* still he would take but a defeasible estate, as under all of the authorities his failure to survive his wife would operate (if we can venture to use the expression in reference to such a limitation) as a condition subsequent, by which his estate would be divested in favor of said heirs. So, treating the limitation either way, the plaintiff has not acquired such an absolute estate in fee as is necessary to enable him to comply with the terms of the contract which he seeks to enforce against the defendant. It may be further observed that the position that the warranty in the deed of the life tenant can defeat the remainder of the said heirs by way of rebutter, is wholly untenable. The Code, sec. 1334; *Moore v. Parker,* 34 N. C., 123." We also refer to *Rees v. Williams,* 164 N. C., 128 (165 N. C., 201, on rehear-

ing); and *Latham v. Lumber Co.*, 139 N. C., 9, where the contingent quality of such limitations was considered.

The intention of the testator appears more manifest when we consider that he devises the property, and the use thereof, to his wife for life or widowhood, and then provides, not for the vesting of an estate in his children before his wife dies, but for its management after her death and until all of them arrive at maturity, each child, as he or she comes to full age, to have his or her share of the income, the rest, or so much as is necessary, to be held for the support of the minors, until all are twenty-one years old, when the division is to be made, if Mrs. Fisher is then dead, with special provision for a "voice of the children" in the management of the estate, it will show clearly that the children do not acquire an estate absolutely vested, until Mrs. Fisher's death. *Whitfield v. Douglas,* 175 N. C., 46-48, and cases therein cited; *Campbell v. Cronly,* 150 N. C., 458; *Smith v. Lumber Co.,* 155 N. C., 389, and especially at pp. 393-394. Under this construction of the will of Mr. Fisher, the plaintiffs cannot convey a good title to the purchaser of the land, who is one of the defendants.

But the plaintiffs further contend that it was adjudged in *Fisher v. Fisher* that the children of Mr. Fisher "are the owners in fee of the property, subject to the rights and estate of Mrs. Fisher." The suit was originally brought to have a commissioner and receiver appointed to manage and sell the property to pay the debts of Mr. Fisher, who, at the time of his death, was largely involved. Mr. A. L. Brooks was appointed and managed the estate with so much skill that it was relieved of Mr. Fisher's debts, and a large and valuable portion of it was saved for the children. Mr. Brooks resigned and Mr. Bray was appointed as his successor. After he had been in office for some time, the widow and children moved in that cause for an accounting by Mr. Bray, as trustee, and his discharge, and that the property be turned over to them, a reference was ordered, report filed and confirmed, and a full settlement had with Mr. Bray, who was thereupon discharged from further service and liability, and the remaining property and effects were ordered by the court to be turned over to the widow, as administratrix with the will annexed of Mr. Fisher and the children, by Mr. Bray, the trustee, which was accordingly done by him. The referee found and concluded that Mr. Fisher's children (naming them) were "the owners in fee of said remaining estate, subject to the rights and estate of the said Isabella Fisher," the widow. It will be seen, therefore, that the widow and children, who now tender the deed to the purchaser of the land sold by them to him, did not buy this land under any order in that proceeding, but Mrs. Fisher, as administratrix *c. t. a.* merely received back the property not theretofore sold, or otherwise disposed of. Their motion was

for an account and settlement with Mr. Bray and his discharge, and that the property and effects in his possession, as trustee, be delivered to Mrs. Fisher as administratrix. There is no mention in any of the proceedings of the grandchildren of Mr. Fisher or their contingent interests. They were not made parties by the appointment of a guardian *ad litem,* or otherwise. There is not now any of them *in esse.* The Court was not required to pass upon the particular kind of estate Mrs. Fisher or her children had in the property, and it was not at all within the scope of the cause of action. They merely asked that the property and estate be returned to them, such as they had when they made their motion. It was not necessary to pass upon their title or the nature of their estate. Their claim was fully satisfied when the Court ordered the property to be returned to them. It is said in *Whitesides v. Cooper, supra,* at 577-578: "The life tenant (Catherine) having died in 1887, the plaintiffs' contention must be sustained, unless they are bound by the decree of sale. Neither these plaintiffs (if indeed they were in existence at that time), nor their father were parties to the proceeding; but it is insisted that they were represented by others of the same class, or at least by the life tenant. It is plain that the other parties could not represent these plaintiffs as a part of the same class, and upon this point it is only necessary to refer to *Irvin v. Clark,* 98 N. C., 437, and the authorities therein cited. Equally untenable is the position that these contingent remaindermen were represented by the life tenant. This would be a very radical departure from well settled principles, and has received no countenance from this Court."

Speaking of an adjudication outside of the matter involved or the scope of the issue, the Court held, in *Munday v. Vail,* N. J. L., p. 418: "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court,

and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises."

And again: "The validity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, *Lord Coke,* treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop,' " citing Co. Litt., 352-b.

In *Hobgood v. Hobgood,* 169 N. C., 490, this Court said, in applying the doctrine just stated, the above statement of it being quoted and approved: "It was urged for the appellant that the former decree established an interest in the fund in favor of the children of Pattie Pippin and Mollie Hobgood, and the present decree having also recognized such an interest, the same not having been appealed from, may not now be disturbed; but we are of opinion that, on the record, such a position cannot be sustained. The former decree, as stated, was designed and intended to preserve the fund in lieu of the property and to subject it to the terms and limitations of the devise, and, while the court below, misconstruing the devise, may have undertaken to recognize an independent interest in the children, there was nothing in that proceeding that conferred any such power on the Court."

The Court then referred to the passage taken from the *New Jersey case, supra,* and further said: "A similar ruling was made by the same eminent Court in *Dodd v. Una,* 40 N. J. Eq., 672, where the position was applied and sustained in learned opinions by *Magie, J., Dapue, J., concurring,* and the general principle has been recognized in this jurisdiction in *Springer v. Shavender,* 118 N. C., 40, and *Allred v. Smith,* 135 N. C., 443, the New Jersey decision, referred to, being cited with approval in the first of these cases."

But neither the referee nor the court intended to decide any question concerning the particular nature of the estate limited over to the grandchildren. It was right to say that the children had a "fee," for it was such an estate, though a defeasible one. It surely was not the purpose of the learned referee to deny the right of the surviving child of any deceased child of the testator to take under the will. The court had no power to do so, and never intended to make any such decision, and the

referee does not say that the children are the absolute owners in fee. The order of Judge Devin merely took the property out of the possession of Bray and turned it back to Mrs. Fisher and the children to be held according to their rights under the will, and just as they had held it before the suit was brought, and this left but one question to decide, and that was the correctness of Mr. Bray's account, and the order of Judge Devin shows inferentially that he was of that opinion. Neither party seemed to attach any special significance to the finding as to the title, for such matter was clearly not involved.

The plaintiffs contend that the judgment was one *quasi in rem,* and affected and concluded all persons, whether parties to or not. We have said that the court had no jurisdiction to decide as to the title of unborn grandchildren, and did not, in fact do so. The judgment does not, therefore, conclude as to their title. Mr. Black, in his excellent treatise on Judgments (2 ed.), 2 vol., sec. 793, states clearly the difference between actions strictly *in rem* and those which are designated as actions *quasi in rem,* and quotes extensively from *Freeman v. Alderson,* 119 U. S., 187, as giving a most satisfactory definition of these terms, the one being against property which is considered as the instrument of the wrong, where the court acquires jurisdiction over the thing by seizure, and proceeds by citation to the world, where the owner may come in if he likes and vindicate his right to it. The Court then says: "There is, however, a large class of cases which are not strictly actions *in rem,* but are frequently spoken of as actions *quasi in rem,* because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claim asserted. Such are actions in which property of nonresidents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem,* in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties." Mr. Black then proceeds to give illustrations of such an action, as follows: "Partition proceedings, or proceedings to quiet title, or to remove clouds from title." In neither case is it held that a party can be divested of his property by a proceeding to which he is not a party, and of which he has had no notice, not even by general citation to the world. This contention has no merit, as it is perfectly plain that a person cannot be deprived of his property by any such method as relied on in this case. The children of Mr. Fisher could not represent the ultimate devisees, because they are not of the same

class, and their interests are really hostile, as it would be best for them that the interests of the grandchildren be destroyed, in which event they would acquire the fee simple absolute.

This case is not governed by the Act of 1903, ch. 99 (Pell's Rev., sec. 1590), or the Acts of 1905, ch. 548. It is said by *Justice Hoke,* in *Dawson v. Wood,* 177 N. C., at 162: "In this jurisdiction, and on the facts thus presented, the courts have not had the inherent power to decree a sale of property and pass a valid title to the purchaser, the remainder here being limited on a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant," citing *Hodges v. Lipscombe,* 128 N. C., 57; *Aydlette v. Pendleton,* 111 N. C., 28; *Williams v. Hassell,* 74 N. C., 434; *Watson v. Watson,* 56 N. C., 401. He then refers to the above statutes as applying only to the class therein named, and for the purposes therein expressed; that is, for a change of investment, and that a guardian *ad litem* must be appointed to represent the contingent remaindermen. But our case is clearly not embraced by any of these statutes, and, besides, the suit was not brought under them, nor any facts alleged which will make them applicable. This is not a suit for a change of investment, and never has been, in any feature of it. In this connection, it will be proper and pertinent to state what is appositely said in *Whitesides v. Cooper, supra,* at p. 578: "Neither is there any force in the contention that our case falls within the principle of *England v. Garner,* 90 N. C., 197, and other decisions in which the Court has gone very far in sustaining judicial sales. It is not pretended that these plaintiffs, even if *in esse,* were represented by guardian or by any one claiming to be their attorney. Indeed, they are not mentioned as parties in any stage of the proceeding, nor is there anything in the decree which purports to bind their contingent interests."

In this case, if we upheld the plaintiffs' contention, it would result in depriving the ulterior devisees of their rights, without any kind of hearing, or any kind of representation in the action, which is contrary to the spirit of the law, even in the case of contingent interests.

We know of no law which would justify us in so holding, and thereby commit so great an injustice.

This decision has nothing to do with the validity of titles acquired under sales heretofore made in this suit by order of the court where it is pending. They may be protected by another principle. *Yarborough v. Moore,* 151 N. C., 116, citing *Carraway v. Lassiter,* 139 N. C., 145. But we do not say how this is, as that question is not before us. The court must have jurisdiction of the cause and the parties before even a purchaser at a judicial sale will be protected, *Yarborough v. Moore, supra,* and that being so, it cannot surely deprive a person of his interest

in property without giving him any chance to be heard. Even by the statutes relating to the sale of contingent interests, the rights of the owners are carefully guarded.

After a most careful deliberation, and with a full realization and appreciation of the important result which may flow from our decision, we have concluded that his Honor, Judge Bryson, was correct in his ruling that the plaintiffs cannot comply with their contract and pass a good and indefeasible title, by their deed, to the land purchased by the defendants.

Affirmed.

WADE RECTOR, BY HIS NEXT FRIEND, ALICE RECTOR, v. THE LAUREL RIVER LOGGING COMPANY.

(Filed 20 December, 1919.)

1. Summons—Alias—Irregularities—Pleadings—Answer—Waiver.

Where a summons has been issued more than ten days prior to the commencement of a term of court, but served after it had commenced and no alias issued, and at the next term the complaint and answer have been filed, objection cannot successfully be maintained for failure of the plaintiff to keep up alias summons and for break in the chain thereof, all defects or irregularities in the preliminary process or notice of action being thereby waived by the voluntary appearance of the defendant.

2. Judgments—Minors—Next Friend—Consent—Actions—Bar—Courts—Approval—Questions of Law—Courts—Trials.

The next friend of a minor suing to recover damages for an alleged negligent injury has no authority to compromise and adjust the claim without sanction and approval of the court on investigation of the facts, and where a former judgment is set up as a bar to the present action purporting to show that the plaintiff's claim had been settled and compromised by consent, it will not be so considered, as a matter of law, when it appears in the judgment, thus relied upon, that, *prima facie*, it had been made by the parties without the supervision of the court; and when the plaintiff is permitted by the court to reply, and, after setting forth the facts, he avers that the said judgment is colorable and collusive and in fraud and substantial prejudice to the minor's rights, an issue of fact thereon is presented for the determination of the jury.

3. Same—Pleadings—Fraud—Questions for Jury.

Where it appears of record that a next friend of a minor had been appointed to enter suit for damages for an alleged negligent injury, and a consent judgment had been entered in a certain sum, reciting a compromise and settlement, etc., which consent was signified by the signing by the attorneys for the parties, this judgment, upon its face, does not pur-

port to have had the interests of the minor investigated and determined by the court, and is insufficient, as a bar to a subsequent action, as a matter of law.

CIVIL ACTION to recover damages for personal injuries to infant plaintiff caused by alleged negligence of defendant company, tried before *Ray, J.*, at May Term, 1919, of MADISON.

On motion, there was judgment dismissing the action, and plaintiff excepted and appealed.

John C. Hendricks for plaintiff.

Guy V. Roberts and Martin, Rollins & Wright for defendant.

HOKE, J. The court entered judgment dismissing plaintiff's action "for failure of the plaintiff to keep up alias summons, and for a break in said summons," and, from an inspection of the record, finds the following facts in support of the judgment:

"That a summons as issued in this cause, entitled as above, on 9 November, 1918; that same was returnable to the November Term, 1918, of the Superior Court of Madison County, and that said term convened on 25 November, 1918.

"The court further finds that said summons was placed in the hands of the sheriff of Madison County for service on the defendant on date of 14 November, 1918, being more than 10 days prior to said term.

"The court further finds as facts that said summons was served upon the defendant as required by law under date of 5 December, 1918, or sixteen days after the said November term had convened.

"The court further finds as a fact that the plaintiff caused no alias summons to issue at the November term, or took any order to that effect."

It appears, however, from a further inspection of the record that the sheriff returned the summons into court to the February, the next succeeding, term after said service; that on 27 January plaintiff, appearing by his next friend, filed his verified complaint in the cause, setting forth his claim with great fullness of detail and containing averment to the effect that on 29 March, 1918, while in the employment of the defendant, engaged in their work, he received painful and permanent physical injuries by reason of defendant's negligence, plaintiff's foot being crushed so that it had to be amputated in part, and causing him great pain and suffering, and which wound had never healed, etc., and laying his damages at $3,000; that at the said February term defendant appeared generally and filed his duly verified answer, denying the allegations of negligence, and setting up further in bar of plaintiff's demand a consent judgment of the Superior Court of Madison County, purport-

ing to be in full compromise and settlement of plaintiff's demand. As shown in the well prepared brief of plaintiff's attorney, the purpose of a summons is to notify a defendant of the pendency of the suit against him, and afford him opportunity to defend, and if, as in this instance, he voluntarily appears and answers, the cause is properly constituted and any defect or irregularity in the preliminary process or its service is thereby waived. *Harris v. Bennett,* 160 N. C., 341; *Caldwell v. Wilson,* 121 N. C., 453; *Hervey v. Edmonds,* 68 N. C., 246. In the *Caldwell case, supra,* the position is very well stated by *Associate Justice Douglas,* as follows: "The only effect of the summons is to bring the defendant into court by giving him legal notice, and, if he voluntarily appears without limiting his appearance, he is held to waive a summons and is as completely in court as if it had been served. The court or other tribunal having jurisdiction of the subject-matter has thereafter complete jurisdiction of the person," citing *Wheeler v. Cobb,* 75 N. C., 21, and other cases. And, further, in *S. v. Jones,* 88 N. C., 683-685, this Court has said: "The object of process is to give notice, and an opportunity to make defense to the action. The *scire facias* furnished this notice, and the sureties submitted to the jurisdiction and resisted the demand for judgment. A defendant may appear without process and his appearance dispenses with process, since its purpose is to bring him into court, and he is in court when he appears and defends the action." And in *Myer v. R. R.* it was said by *Reade, J.:* "If no summons had been issued, the filings of a complaint and answer would have constituted a cause in court."

It is insisted for defendant that while these, and other authorities of like kind, may be decisive against the order dismissing plaintiff's suit because of a discontinuance, the judgment should be upheld by reason of facts appearing in the answer, showing that plaintiff's claim had been fully compromised and settled by reason of a consent judgment, appearing in the records of Madison County, in terms as follows:

"Consent Judgment.

North Carolina—Madison County.

In the Superior Court—November Term, 1919.

(Title of Cause)

This cause coming on to be heard by his Honor, *P. A. McElroy, Judge* presiding, at the November Term, 1918, of the Superior Court of Madison County, and it appearing to the court that all matters in controversy in this action has been compromised and settled, in consideration of the sum of $535.70, which said sum has been paid in full to the said plaintiff by the said defendant, and the receipt of the same duly acknowledged; it is, therefore, by consent of parties, ordered and adjudged that the said

plaintiff take nothing further by his said action, and that the defendant pay the costs of this action, to be taxed by the clerk. It is agreed by both the plaintiff and defendant that this judgment may be signed by the judge of the Nineteenth Judicial District out of term.

....,

Judge Presiding.

By consent:

(Signed) J. C. RAMSEY, Attorney for Plaintiff.

(Signed) GUY V. ROBERTS, Attorney for Defendant."

And the facts appertaining to the entry of this judgment are given in the answer as follows: "That on 14 November, 1918, J. J. Rector, father of the plaintiff, was duly appointed his next friend for the purpose of bringing the action for the injury, the same set forth in the complaint; that he forthwith entered suit for plaintiff and said Wade Rector, by his next friend, J. J. Rector, compromised the case for 535.70, which said amount included the hospital and doctor's bills, etc., and said consent judgment made and entered in pursuance of settlement," etc.

There are well considered decisions here and elsewhere to the effect that a next friend is without authority to compromise and adjust a claim of this character without the sanction and approval of the court on investigation of the facts and that *prima facie* a consent judgment has been made by the parties without supervision of the court. *Bunch v. Lumber Co.*, 174 N. C., 8; *Ferrel v. Broadway*, 126 N. C., 258; *Rankin v. Schofield*, 71 Ark., 168; *Mo., etc., R. R. v. Lasca*, 79 Kansas, 311; 14 R. C. L., 288-89.

In *Ferrell v. Broadway* it was held: "While a consent decree may be entered against an infant, when the facts are developed and found by the court, who adjudges it to be for the best interest of the infant, yet where issues are joined, but no evidence introduced, and no explanation made to enable the court to exercise supervision over the interest of the infants, a consent judgment will not stand." This case was reheard in 127 N. C., 404, but on a different ground, and the principle referred to was in no wise modified or questioned.

In *Ry. v. Lasca*, it was held: "The parent, when acting as next friend for his infant child, who has been regularly made a party to an action, may properly negotiate for an adjustment of the controversy. He cannot, however, bind the infant by such settlement, which can only become effective by due judicial examination and adjudication.

"Where the proceedings in court are merely formal, and are instituted and carried on only to give an apparent sanction to the settlement, and there is no judicial investigation of the facts upon which the right or

extent of the recovery is based, a judgment entered in pursuance of the agreement, and by consent merely, is only colorable, and will be set aside in a proper proceeding when its effect, if allowed to stand, would be to bar the infant's substantial rights."

In *Rankin v. Schofield* it was held, among other things: "A decree which recites that as litigation is likely to be long, and, in order to put an end thereto, and as an amicable adjustment and settlement of a family affair, 'it is hereby ordered, considered, and decreed by the court, as well as by the consent and agreement of all the parties,' etc., shows on its face that it is merely a consent decree, enforcing the compromise of the parties."

On the record as now presented, the principles approved in these and other like cases would seem to be against the validity of this alleged adjustment as a matter of law, but, postponing decision on this question until the facts shall be more fully disclosed, this consent judgment may not be accepted as conclusive, because plaintiff, by leave of court, has filed a reply in the case in which, setting forth the facts, he makes averment that the alleged judgment is colorable and collusive, and in fraud and substantial prejudice of plaintiff's rights. There is direct decision with us that a judgment, purporting to make final disposition of the rights of the parties, may be questioned in this way. *Houser v. Bonsal,* 149 N. C., 51.

The issue of fraud is sufficiently raised in the pleadings, and we are of opinion that the judgment dismissing the action must be set aside, and the cause reinstated that the issues arising in the pleadings may be properly tried and determined. There is error.

Reversed.

S. W. LEDFORD v. WESTERN UNION TELEGRAPH COMPANY ET AL.

(Filed 20 December, 1919.)

1. Courts— Jurisdiction— Actions— Transitory Causes— Nonresidents— Process—Summons.

An action to recover damages for an injury negligently inflicted is for a transitory cause following the person of the party injured, and he, though a nonresident, may maintain it in the courts of our State upon a cause of action arising in another State, irrespective of the nonresidence here of any or all of the parties, or whether the defendant be a corporation, or the place where the injury was inflicted, if valid service of summons can be herein made.

2. Statutes—Other States—Decisions—Adopted Here—Interpretation.

Where a statute law of another State is afterwards enacted here, and the language has received a settled construction there, the Legislature will be presumed to have adopted it with the intention that it shall receive that interpretation.

3. Courts—Jurisdiction—Transitory Cause—Statutes—Other States—Interpretations.

Our statute, Rev., 423, providing that actions against foreign corporations may be brought in any county wherein the cause of action arose or in which the corporation usually does business, or in which it has property, or in which the plaintiff, etc., resides, under certain restrictions, is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; and under our own decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of our courts of transitory causes of actions.

APPEAL by plaintiff from *Ray, J.*, at the May Term, 1919, of MADISON.

This is an action to recover damages for personal injury, which was dismissed for want of jurisdiction, and the plaintiff excepted and appealed.

C. B. Mashburn for plaintiff.

Merrimon, Adams & Johnston for defendants.

ALLEN, J. The plaintiff is a nonresident, the defendants are nonresident corporations, and the cause of action arose in Tennessee.

Can the action be maintained in the courts of this State?

The rule which prevails and is controlling is stated in *Reeves v. Southern Railway Company*, 121 Ga., 561, as follows: "The weight of modern authority seems to support the proposition that a foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served. From among the numerous cases relating to this subject we cite the following. *Eingartner v. Illinois Steel Co.*, 94 Wis., 70; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va., 971; *Haggin v. Comptoir D'Escompte*, 23 Q. B. D., 519; *Lhoneux v. Hong Kong, etc., Banking Corp.*, 33 Ch. D., 446; *Dennick v. Central R. Co.*, 103 U. S., 11, 18; *St. Clair v. Cox*, 106 U. S., 350, 354; *Barrow Steamship Co. v. Kane*, 170 U. S.,

109; *Knight v. West Jersey R. Co.*, 108 Pa. St., 250. See, also, Reno on Nonresidents, par. 44, *et seq.*; Minor's Conflict of Laws, par. 192."

Also, in *Eingartner v. Illinois Steel Co.*, 94 Wis., 70: "This is an action to recover damages for injuries to the person. It is, therefore, purely a transitory action, and the principle that the courts of this State have jurisdiction to entertain such an action, although the cause arose in Illinois and the parties are residents of Illinois, is unquestioned. *Curtis v. Bradford*, 33 Wis., 190."

In *Pullman v. Lawrence*, 74 Miss., 797: "It is assigned for error that the court below erred in sustaining plaintiff's demurrer to the plea to the jurisdiction filed by the defendant.

"Until the hearing of the able and exhaustive oral argument of appellant's counsel in support of this assignment, we had supposed there was, in our own State, no ground left for dispute that, in transitory actions, whether in tort or on contract, our courts were wide open to any suitor, resident or nonresident, against his adversary, whether resident or nonresident, whether a natural person or an artificial one, regardless of where the right of action occurred, if only the courts had jurisdiction of the subject-matter, and could obtain jurisdiction of the party, either by a voluntary appearance or by the service of process."

In *Burns v. R. R.*, 113 Ind., 172: "A civil right of action acquired under the laws of the State where the injury was inflicted, or a civil liability incurred in one State, may be enforced in any other in which the parties in fault may be found, according to the course of procedure in the latter State."

To the same effect 12 R. C. L., 115, and cases so collected in the note, 2 Anno. Cases, 210.

Is there any statute in our State changing this rule? The one relied on, and the only one that has any relevancy, is section 423 of the Revisal, which provides that actions against foreign corporations may be brought in any county in which the cause of action arose, or in which the corporation usually does business, or in which it has property, or in which the plaintiffs, or either of them, reside, in the following cases:

"1. By a resident of this State, for any cause of action; or by a nonresident of this State in any county where he or they are regularly engaged in carrying on business.

"2. By a plaintiff, not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated within this State."

This statute is under venue and not jurisdiction, and while it enumerates certain cases it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed.

It is taken from the New York statute on the subject, and, "Where the Legislature enacts a provision taken from a statute of another State or county, in which the language of the act has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction." 36 Cyc., 1154.

In *Dewitt v. Buchanan,* 54 Barb. (N. Y.), 32, the Court says: "Actions for injuries to the person are transitory, and follow the person; and, therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in our courts for a tort committed in another country, the same as on a contract made in another country.

"It is now settled that the courts of this State have, and will entertain, jurisdiction of actions for personal injuries committed abroad, when both, or either of the parties, are citizens of the United States."

And in *Robinson v. The Oceanic Steam Co.,* 112 N. Y., 322: "In the same year section 427 was added to the Code of Procedure, providing as follows:

"An action against a corporation, created by or under the laws of any other State, government, or country, may be brought in the Supreme Court, the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York, in the following cases:

"1. By a resident of this State for any cause of action.

"2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated within the State.

"This section did not assume to define all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily, by service or process in the mode prescribed by law, be subjected to the jurisdiction of the courts. It did not deprive the courts of any of their general jurisdiction.

"The Supreme Court, being a Court of general jurisdiction, independently of any statute, entertain actions against foreign corporations. Such corporations could, by the common law, always be sued in this State by any plaintiff for any cause of action, provided jurisdiction could be obtained of their person (Morawetz on Corp., sec. 977, and case cited in note); and so it was held construing this section of the Code in *McCormick v. Pennsylvania Railroad Co.* (49 N. Y., 503). There the action was brought by a nonresident plaintiff against a foreign corporation for a cause of action which arose without the State, and it was held that the court could entertain the action because the defendant had

appeared generally in the action, and submitted itself to the jurisdiction of the Court, the cause of action being one of a class coming within its jurisdiction." The Court then proceeds to show that thereafter the statute was amended by adding after "following cases" the word "only," and that this had the effect of limiting the jurisdiction.

The authorities in our own State, before and since the statute, are to the same effect.

In *Walker v. Breeder,* 48 N. C., 64, *Pearson, J.,* says: "We think it settled that a citizen of South Carolina may sue another citizen of that State in the courts of our State upon a personal cause of action originating in South Carolina. *Miller v. Black,* 2 Jones, 341." And this is approved in *Thompson v. Tel. Co.,* 107 N. C., 456; *McDonald v. McArthur,* 154 N. C., 125, and in other cases.

In the *Thompson case* the action was by a nonresident against a nonresident corporation.

"We are, therefore, of opinion that the action can be maintained in this State, and that the ruling of the court below is erroneous."

Reversed.

GEORGE W. GARLAND v. THE JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 20 December, 1919.)

1. Insurance, Life— Reinsurance— Premiums— Payments —Renewals— Statutes—Notice—Contracts.

Where a life insurance company has issued its policy prior to the enactment of ch. 884, Laws 1909, requiring that a written or printed notice be mailed, postage paid, addressed to the insured or the assignee of the policy at his or her last known postoffice address in the State, stating the amount of premium due, installment, or portion due thereon, etc., and subsequent to said enactment, the insurer has reinsured with another company, which assumed its obligations and under a contract with the insured has issued another policy in the place of the old one: *Held,* the new policy so issued comes within the expressed terms of the act—any policy "hereinafter issued," and the subsequent payment of premiums is also a "renewal" within its terms, and requires that in the absence of the statutory notice, the policy may not be declared lapsed or void "within one year after default in payment of any premium," etc.

2. Same—Waiver—"Blue Notes"—Illegal Stipulations.

Where the statutory notice of premiums due, etc., on a policy of life insurance has not been given as required by ch. 884, Laws 1909, and thereafter the company accepts payment of the premium in part and a "blue note" for the balance, the waiver therein of the statutory notice is illegal and unenforcible.

3. Insurance, Life— Reinsurance— Special Contracts— Evidence— Questions for Jury—Trials.

Where a life insurance company has assumed all the obligations of another insurer, and has reissued its policies under an agreement to set aside a further sum each year for the benefit of the policy holders, the question as to whether it has done so and paid it, under conflicting evidence in the insured's action to recover it, is one for the jury.

4. Insurance, Life—Breach by Insurer—Actions—Ill Health—Measure of Damages—Value of Policy—Deductions—Reinstatement.

Where a life insurance company has wrongfully attempted to cancel or annul a policy it had issued, and has unlawfully refused to accept the premium tendered, at a time when, by reason of disease, the insured cannot pass a successful physical examination, he may elect to treat the policy as at an end, and recover its face value, reduced by the premiums he may reasonably thereafter be called upon to pay, and such amount that would be due him under any special contract made for his benefit by a reinsuring company, and as the jury may determine under the evidence; unless in this case the defendant elects to reinstate the policy sued on, by accepting plaintiff's offer made before bringing his action.

BROWN, J., dissenting.

APPEAL by both plaintiff and defendant from *Ray, J.*, at June Term, 1919, of BUNCOMBE.

This action is for the wrongful cancellation of a life insurance policy, and to recover damages for the failure of the defendant to pay to the plaintiff his pro rata share of a fund created under a special contract.

The following issues were submitted:

1. Did the defendant wrongfully forfeit or lapse policy No. 1706-A for $5,000 issued to the plaintiff, the same being the policy sued on? Answer: "Yes."

2. If so, what damage, if any, is the plaintiff entitled to recover? Answer: "Premiums paid in, with interest."

3. What amount, if any, was the defendant indebted to the plaintiff at the date of the forfeiture or lapse of policy No. 1706-A by reason of the special contract entered into between the plaintiff and defendant. Answer: "$150."

Upon this verdict the court entered judgment in favor of the plaintiff on the second issue for $1,790.58, the same being the amount of payments made by the plaintiff to the defendant, and on the third issue for $150, and interest on both sums. From this judgment both parties appealed.

George W. Garland, in persona, for plaintiff.
Brooks, Sapp & Kelly for defendant.

CLARK, C. J. On 23 November, 1904, the plaintiff took out a policy of $5,000 in the Security, Life and Annuity Company upon the annual

payment of a premium of $104.30. On 20 September, 1912, the defendant, the Jefferson Standard Life Insurance Company, with the consent of the Security, Life and Annuity Insurance Company, entered into a contract with the plaintiff for the performance of the conditions of said policy, it having assumed all the liabilities and contracts of the aforesaid Security, Life and Annuity Company.

It is admitted that the plaintiff made nine annual payments, but being out of the State, he did not pay the premium which fell due on 23 November, 1912, and on 20 December, 1912, sent a check for $25, and by arrangement with the defendant executed what is called the "blue note," which is as follows:

"Pol. No. 1706-a. Mobile, Ala., November 23, 1912.

On or before February 23, 1913, after date, without grace and without demand or notice, I promise to pay to the order of the Jefferson Standard Life Insurance Company sixty-five and 85/100 dollars at home office, Greensboro, N. C., value received, with interest at the rate of six per cent per annum.

This note is accepted by said company at the request of the maker, together with the twenty-five and no/100 dollars in cash, on the following express agreement:

That although no part of the premium due on the 23d day of November, 1912, under policy No. 1706-a issued by the Security, Life and Annuity Insurance Company on the life of George W. Garland, and reinsured by Jefferson Standard Life Insurance Company, has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said Jefferson Standard Life Insurance Company as payment of said premium, and all right under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said payee company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said payee company has duly given every notice required by its rule or by the laws of any State in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive, every other notice in respect to said premium or this note, it being well understood by said maker that

said payee company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms. GEO. W. GARLAND.

$ 0.98
65.85

$66.83 11-23."

This was endorsed by the defendant company: "Policy lapsed for nonpayment of this note."

Laws 1909, ch. 884, provides that, "No insurance corporation doing business in this State shall, within one year after default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed, . . . unless a written or printed notice stating the amount of such premium, interest, installment, or portion due thereon on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured, or the assignee of the policy, . . . at his or her last known postoffice address in this State," etc.

The court instructed the jury, quoting the above statute, and reciting the evidence. "The court instructs the jury that, under the law in North Carolina, it is the duty of the insurer to notify the insured of any premium or portion of premium or interest on such portion, of the date when said premium, portion, or interest thereon, is due, and state in said notice, which shall be mailed at the expense of the insurer to the last known address of the insured that unless said portion or interest thereon is paid on or before the date mentioned in said notice, that said policy will be lapsed or canceled; that the only notice purporting to be given of the portion of the premium the defendant alleges to be due by the plaintiff in this case was mailed, not to the last address in this State of the plaintiff, but was mailed to Montgomery, Alabama, and the court instructs the jury that, under the law, such notice was not properly made. The notice has been introduced in evidence, and the court instructs the jury that said notice does not comply with the terms of the statute of 1909, in that it does not notify the plaintiff that his policy will be lapsed or canceled unless the same is paid on or before the date given in said notice, and, therefore, the court instructs the jury that any lapse or cancellation of the policy by reason of such notice was wrongful and that such lapse or cancellation was a wrongful cancellation. I modify that instruction, gentlemen, by stating again, if, without notice, the plaintiff procured the extension of time by reason of the execution of the blue note offered in evidence, that then such notice would not be re-

quired, and by the execution of the note, if he did execute it, he waived the notice; but that is all predicated, gentlemen, upon the fact that you must find that the defendant did not owe the plaintiff a sufficient amount to pay the premium, by reason of the special contract." The defendant excepted. The jury must have found with the plaintiff's contention, as it answered the first issue "Yes," that the policy was wrongfully canceled.

On 22 July, 1913, the defendant wrote to plaintiff at Salisbury, N. C.:

"Re Policy 1706-A.

DEAR SIR:—Please let us have your check for $21.43 covering interest due and accrued on loan in connection with your above numbered policy to the next anniversary date. This is very important, and we will appreciate your prompt attention."

....."

In August or September, 1913, the plaintiff tendered payment of the balance due on the premium to the home office company, which was refused, it claiming that the policy was forfeited.

The defendant rests his contentions on two points:

1. That the Act of 1909 was passed subsequent to the original insurance, which was made in 1904. But the reinsurance with the defendant company was thereafter in August, 1912, and by the terms of the act one year's notice is required to be issued for nonpayment of premium on any policy "hereafter issued, or *renewed.*" The new policy issued by the defendant company in August, 1912, was a renewal, and we are also of opinion that independently of that a policy is "renewed" whenever the premium is paid.

And further, the "blue note," so called, which was intended and expressed to be a waiver of the statute giving this protection to the policyholders was illegal and without force and effect as a waiver of the protection of the policy, for the very object of the law was to protect the policy-holder who was in straits. The above instruction was erroneous as to plaintiff. The defendant could not evade or repeal the statute by such device.

The second cause of action was for the recovery of $6,000, alleging that under a paper-writing called the "special North Carolina contract," the issuing company agreed to allow the plaintiff a credit each year on his premium of a certain special dividend to be ascertained in the following manner: "The company was to set aside $1 for every contract in force written in the State of North Carolina for 10 years from 1 September, 1901, on which there had been paid during the preceding 12 months one annual or two semiannual or four quarter-annual premiums, and so long as such premiums shall be paid; this fund to be divided among

a group of not exceeding 600 persons (of whom the plaintiff shall be one), and the quotient was to be the special dividend." The plaintiff alleged that the company had concealed and withheld from him large sums of money to which he was entitled by reason of this special dividend contract. In his brief the defendant says: "The company produced in court, at great expense and serious inconvenience to itself, its original cards, books, bookcases, and steel filing cases, consisting of one ton in weight," and says further that its assistant actuary testified that upon a calculation made by him from these original records, plaintiff had received the amount which he was entitled to. The testimony for the defendant was certainly weighty in avoirdupois, but the jury upon all the testimony found that there was a greater weight on the side of the plaintiff, and that the sum of $150 was due him on that issue. This was a question of fact, and the judge below did not disturb the verdict.

There were numerous exceptions, but upon review of the record, the arguments, and the authorities, we find no error entitling the defendant to a new trial.

The plaintiff's assignment of error on his appeal is that on the second issue the court restricted the measure of damages for the wrongful cancellation of his policy of life insurance to the premiums paid, plus interest on each premium from the date of its payment.

This Court has so held where the plaintiff bases his action upon that ground. *Braswell v. Ins. Co.*, 75 N. C., 8; *Lovick v. Ins. Co.*, 110 N. C., 93, and many others cited in *Brockenborough v. Ins. Co.*, 145 N. C., 355, but in those cases it was the defendant who was resisting that method of computation. But, in this case, the plaintiff contends that the defendant having wrongfully canceled the policy, it was its duty to save the plaintiff harmless. *Burrus v. Ins. Co.*, 124 N. C., 9; *Herring v. Lumber Co.*, 159 N. C., 382. And that while in an ordinary case the payment of the premiums and interest will put the parties back *in statu quo*, and enable the insured to purchase another policy at his advanced age, with the increased premium rate. *Braswell v. Ins. Co.*, 75 N. C., 8, in this case the plaintiff contends that owing to his having contracted an incurable disease (tuberculosis) he cannot reinsure at all, and that he can elect to treat the policy as at an end and recover its just value, *Trust Co. v. Ins. Co.*, 173 N. C., 567; that if it should reasonably appear, as in an action for a wrongful death, that the insured would not live exceeding one year taking all the evidence into consideration, then the jury would be justified in finding the value of the policy was its face value, reduced by the interest for one year, and the one premium if they should find that the insured would be reasonably expected to pay another premium.

It cannot be said that an insurance company is at liberty to cancel any of its policies at its pleasure when (as in this case) one of its insured becomes afflicted by an incurable disease and can be excused by refunding the premium and interest. The special contract that paid an annual dividend of more than $25 should also be considered in assessing the measure of damages. *Robinson v. Ins. Co.*, 163 N. C., 415.

It would seem that the present worth of the principal sum of $5,000, reduced by the premiums that the jury find that the insured would reasonably be called on to pay, would be the just measure of compensation for the wrongful cancellation of this policy when the plaintiff's condition is such either by reason of age or physical condition he cannot reinsure—unless the defendant shall elect, as it may, to reinstate the policy upon payment of all arrearages of premiums and interest thereon as the plaintiff offered to do before bringing this action. The policy was taken out as a provision for those dependent upon the insured, and they should be reinstated in their reasonable expectation of which they should not be deprived by the wrongful death of the defendant.

The verdict should be set aside upon the second issue, and a partial new trial granted for the assessment of damages thereon in accordance with this opinion.

On defendant's appeal, No error.

On plaintiff's appeal, New trial on second issue.

BROWN, J., dissenting.

JANE JORDAN v. GEORGE D. MILLER.

(Filed 20 December, 1919.)

Negligence—Lessor and Lessee—Employer and Employee—Master and Servant—Contributory Negligence—Evidence—Nonsuit.

Ordinarily a lessor is not liable to an employee or guest of his lessee for a personal injury caused by his failure to repair a defective place in the leased premises, though under contract with his tenant to repair; and where the employee was injured by stepping through a hole in a platform to an outside stairway, of which said employee was aware and had frequently theretofore stepped over, it is evidence of contributory negligence which will bar her recovery of damages in her action. And, *semble*, the court would have been justified in directing a nonsuit under the evidence in this case.

APPEAL by plaintiff from *Ray, J.*, at March Term, 1919, of BUNCOMBE.

This is an action for damages for personal injuries sustained by the plaintiff, an employee of the lessee of the defendant. The jury found

on the issues submitted that the defendant was not guilty of negligence, and that plaintiff contributed to her injuries by her own negligence. Appeal by plaintiff.

F. W. Thomas and R. M. Wells for plaintiff.
M. W. Brown for defendant.

CLARK, C. J. In December, 1915, the premises in question were leased by George D. Miller to Tempe Harris for a residence and boarding-house, and she employed the plaintiff as a cook. The defendant was given a bedroom, which she reached by passing over a platform in which there was a hole three feet long and four inches wide, which had been made in September, 1917, by another employee of Mr. Harris, and plaintiff was injured by stepping into this hole in the month following.

As to the accident, the plaintiff testified as follows: "On 3 October, 1917, said platform and railing around the same was out of repair and in said platform near the door to her sleeping room was a hole; that she knew that said hole was in the platform, having stepped over and dodged it at least twice every day for five days before she received her injuries, and that at the time she was injured she knew where the hole was and intended to step across the hole, but misjudged its location and put her foot into it, causing her to fall, and that she was thereby injured."

By the terms of the lease, the lessor was to attend to all necessary outside repairs, but the lessee agreed to make all inside repairs during the life of the lease. It would seem that this was a defective place in a platform of an outside staircase leading to plaintiff's room. The tenant, Miss Harris, knew that her employee, Elliott, had broken the plank and made the hole, and that a plank 3 feet long and 4 inches wide would have put the platform in repair.

"As a general rule, the landlord is not liable for injuries to third persons on account of the defective repair of premises." 18 A. and E., 238.

In the absence of an agreement as to repairs, it is familiar learning that it is not the duty of the lessor to keep the building in repair. *Improvement Co. v. Coley-Barden,* 156 N. C., 255. There was evidence from the plaintiff's statement that she knew of this broken place in the platform and notwithstanding stepped into the hole. The jury found upon the issues submitted that she was not injured by the negligence of the lessor, but that she was injured by her own negligence. There was evidence to that effect sufficient to go to the jury, and they have so found the fact to be.

The court charged the jury that "the mere fact that the plaintiff knew that there was a hole in the platform at the place where she testified that her leg went through, does not make her guilty of contributory negli-

gence. It is for the jury to say, on the whole evidence, whether or not the plaintiff was negligent, and if they should find that she was negligent, still they should answer the second issue 'No,' if they should find that the negligence of the defendant was the proximate cause of the plaintiff's injury."

In 24 Cyc., 1119, it is said: "The general rule is that a subtenant, guest, or servant of the tenant is regarded as so far identified with the tenant that his right to recover against the landlord is the same as the tenant's right would be had the accident happened to him; but he can have no greater claim against the landlord than the tenant himself would have under like circumstances."

Even where the lessor contracts to keep the premises in repair, "It has been held, with but few exceptions, that the breach by the landlord of his contract to repair the demised premises will not ordinarily entitle the tenant, his family, servants, or guests, personally injured from a defect therein, existing because of the negligence of the landlord in failing to comply with his agreement to repair, to recover indemnity for such injury, whether in contract or tort, since such damages are too remote, and cannot be said to be fairly within the contemplation of the parties. A contract to repair does not contemplate as damages for the failure to perform it that any liability for personal injuries shall grow out of the defective condition of the premises; *because the duty of the tenant, if the landlord fails to perform his contract to repair, is to do the work himself,* and recover the cost in an action for that purpose, or upon a counterclaim in an action for rent, or if the premises are made untenable by reason of the breach of contract, the tenant may move out and defend in an action for rent as upon an eviction. In accordance with this view, in order to recover damages for personal injuries, there must be shown some clear act of negligence or misfeasance on the part of the landlord beyond the mere breach of covenant." 16 Ruling Case Law, 1095.

It may be that upon the principles and authorities above cited, the court might have directed a nonsuit. But, however that may be, the jury, upon instructions free from error, have found upon evidence that the proximate cause of plaintiff's injuries was her own negligence.

No error.

JOHN M. CAMPBELL v. B. J. SLOAN.

(Filed 20 December, 1919.)

1. Principal and Agent—Sales—Commissions—Lease—Evidence—Questions for Jury—Trials.

Where there is evidence tending to show that a real estate dealer was employed by the owner, as his agent, to negotiate with the United States Government to lease his hotel property to the Government for general hospital purposes, and that in pursuance thereof the lease was finally effected by the owner, in the absence of the agent but through his efforts, for a tuberculosis hospital, requiring the expenditure of money for alterations, etc., at a greatly increased and profitable rental; but that pending the negotiations the Government officials wrote that the property "would not meet any present need of the Department": *Held*, it was for the jury to determine, as to the commissions sued for by the real estate agent, and upon the evidence, whether the trade as finally consummated was within the agreement, or procured through his efforts, or whether the owner acted independently, after the agent had failed in effecting a separate lease, as originally contemplated.

2. Principal and Agent—Sales—Commissions—Principal's Denial of Liability.

Where a real estate agent has procured a lease of property for the owner, who accordingly consummates a deal in the agent's absence, but at a less price, the owner may not take advantage of the agent's services and, after making the lease, repudiate his liability for the commissions to which the agent is entitled.

3. Appeal and Error—New Trials—Substantial Error.

A new trial will not be granted on appeal unless upon some substantial ground of error, or where it appears that the error could not have been harmful to the appellant.

CIVIL ACTION, tried before *Ray, J.*, and a jury, at October Term, 1919, of BUNCOMBE.

This action was brought by plaintiff to recover commissions on rent collected by defendant from the United States on the Haywood White Sulphur Springs property, located near Waynesville, and only involves commissions on the rent for eleven days in March, 1918, and for the month of April, 1918. No rent had been collected by defendant for the subsequent months at the time the summons was issued, but he had received rent for thirteen months at the time of the trial in the Superior Court of this case.

Plaintiff, a licensed real estate dealer in the city of Asheville, believing that the Government would rent defendant's property for hospital purposes, wrote a letter to defendant's son, with a request that it be delivered to his father, calling attention to the possibility, and requesting full information and data to be presented to the proper authorities.

The descriptive matter was sent by defendant to plaintiff the following day, with a letter stating that defendant would, at the time of the receipt of the rental, pay the plaintiff a commission of five per cent thereof, if the lease was made. When plaintiff received defendant's letter, he telephoned to defendant and requested him to come to Asheville on the next train, so he could go with plaintiff to Washington, and the latter would there offer the property to the War Department. Defendant came to Asheville, dined with plaintiff, and they left on the next train for Washington. Arriving there, plaintiff and defendant went to the office of Congressman Weaver, and plaintiff secured the assistance of him in obtaining an interview with Major Edgar King at the War Department, and the proposal for the leasing of the White Sulphur Springs property at $400 a month for hospital purposes or a sale at $60,000, was submitted to Major King, who said "he was glad to receive the proposal and would take it up." Plaintiff and defendant remained in Washington two or three days, during which time the former again saw Major King and was assured that "they would take it up and see what could be done and advise later." Plaintiff and defendant then returned to their homes, and plaintiff continued to correspond with Major King and Congressman Weaver in regard to the matter, but was unable to get a representative of the Government to examine the property. He also talked with Major Adams, of Asheville, on different occasions, and finally wrote to the Secretary of War and "told him that he was not getting fair treatment in regard to the Sulphur Springs property, as he couldn't get them to come and see the property," and that "if they would send a man to examine the Sulphur Springs property he knew it was what he had represented it to be." The next thing that occurred was, that Major Adams called plaintiff and told him that Major Bruns, who had been sent by General Gorgas to examine the Sulphur Springs property, was then in his office, and requested plaintiff to have defendant come to Asheville for a conference in Major Adams' office at 8 o'clock that night. Major Bruns requested Major Adams to get in communication with plaintiff, so that plaintiff could notify the defendant to be present at the meeting. Plaintiff then telephoned the defendant and told him of the conversation with Major Adams, but advised defendant not to come to Asheville, but to stay in Waynesville in order to force Major Bruns to go there, "so that he could see the property." Plaintiff said to defendant: "We have tried to get these people over to see the property, so it will be a good thing for you to stay where you are, and let them come out there," and suggested if defendant came to Asheville, Major Bruns would probably go back and never see the property. Plaintiff then telephoned Major Adams and told him that defendant would not come to Asheville, and that Major Bruns would have to go to Waynesville.

Major Bruns went to Waynesville the following morning and leased the property from defendant at $10,000 a year, with the understanding that defendant would make certain improvements to the property, the rent being increased to cover the cost of such improvements, and because the property was used for tubercular patients. On the day after Major Bruns went to Waynesville, plaintiff wrote to defendant, telling him that he allowed Major Bruns to go to Waynesville alone, saying, "I think he feels I rather forced him out there, but it was the only thing to do." Defendant replied the following day, stating that the trade had been made by himself, and he did not consider that plaintiff had anything to do with it.

While plaintiff and defendant were in Washington, plaintiff left with Major King full information and descriptive matter relating to the Sulphur Springs property. On 8 February, 1918, Mr. Raoul, proprietor of the Manor in Asheville, telephoned to defendant and suggested that defendant send a telegram to General Gorgas and offer the White Sulphur Springs property to the Government for a tuberculosis hospital, and defendant did so on the same day, and in his telegram said, "For further description, refer to Major Edgar King's files." Prior to that date defendant received a letter from Major King in regard to the tender by defendant of the Haywood White Sulphur Springs property for hospital purposes in which Major King stated: "It does not meet any present need of the Department." On 11 February, 1918, General Gorgas wired the defendant that an officer had been ordered to inspect the property. Plaintiff paid all of his expenses to Washington and return, and was never notified by defendant that he would not be paid for his efforts until the lease was practically consummated.

Defendant testified that the most he ever received for his property as rental prior to his lease to the Government was $2,500 a year; that he offered it to the Government for a "convalescent hospital" at $4,800 a year. Plaintiff testified that the offer was for "hospital purposes," without restrictions, and it is stated in a letter from Major King to defendant. Plaintiff leased it to the Government at $10,000 a year for a temporary tuberculosis hospital. The property was vacated by the Government in June, 1919, and it was conducted as a hotel during the summer season of 1919 by the same tenant and at the same rental as before the Government took charge. The defendant, when the property was returned to him, received with it a Red Cross building and other improvements put upon the property by the Government, in addition to repairs and improvements made by defendant, and for which the Government paid as part of the rent. Plaintiff was the only person who communicated with any representative of the Government in regard to leasing

defendant's property prior to the time Major Bruns was sent to Asheville, except that defendant sent a telegram to General Gorgas.

The following appears in the charge of the court:

"The defendant asked the court to give the following instructions, which was done:

"1. Unless the jury find from the testimony that the plaintiff was the real and procuring cause of leasing the property, they will answer the issue 'Nothing.'

"2. If the jury find from the testimony that the proposal of December 13 was refused by the Government, and that afterwards the defendant took up the matter and proposed to lease the property for a tuberculosis hospital, and that the lease was made through the defendant's efforts, and not as a result of plaintiff's efforts, as otherwise explained to you, then you will answer this issue 'Nothing.'

"3. If the jury find from the testimony that the proposal of December 15 was for a convalescent hospital, and that the same was declined by the Government, and that afterwards defendant proposed to lease the property for a tuberculosis hospital, and did so lease it, then they will answer the issue 'Nothing,' provided the plaintiff was not the procuring cause in the final trade."

The court further charged the jury: "It depends upon what position the plaintiff occupied in this last trade. If you find from the evidence that the original trade, in which it is admitted that the plaintiff was the defendant's broker and agent, failed to be consummated, and that it closed the matter, and that the plaintiff thereafter was not acting as the agent of the defendant, and a trade subsequently to this took place, then I charge you that if you find that to be the case, and the agency was terminated, then you will answer this issue 'Nothing.' But if you find, after the admission of the parties, that the plaintiff was the agent and broker of the defendant, and that he started the negotiations with the Government and the defendant, and that those negotiations were pending, and that he was the moving, or procuring, cause of the lease, and that the negotiations had not been broken off, and that he was still acting as the agent of the defendant, then you will answer that issue 'Yes,' and give such amount as you determine from this testimony the plaintiff is entitled to recover. So it is a question as to whether or not he was acting as the agent of the defendant, as to whether or not there were two definite contracts, in one of which the plaintiff was the agent of the defendant, and in the other of which he had nothing to do with it, and was not his agent, and the defendant acted on his own initiative."

The court then stated the contentions of the parties.

Verdict and judgment for plaintiff. Defendant appealed.

Mark W. Brown for plaintiff.
Martin, Rollins & Wright for defendant.

WALKER, J., after stating the case as above: The defendant was served with the summons in Buncombe County, and contends that this did not give the justice's court, where the action was originally commenced, any jurisdiction of his person, as he lived in Haywood County. There is nothing in this objection, as the statute only forbids a justice from issuing process in a civil action beyond his county. Rev., 1447; *Austin v. Lewis,* 156 N. C., 461.

The other question relates to the merits, and calls for a consideration of the evidence and the charge of the court upon the issues as to defendant's liability.

It is apparent the case involved largely the question of fact, whether the plaintiff, as broker of the defendant, brought the parties together for the purpose of making the contract of lease. There was evidence tending to show that the plaintiff started the negotiations between them, and was employed by the defendant to assist in him in the matter, because of his special skill in the business of selling and leasing property, he being a real estate broker, having his business office in the city of Asheville. There can be no question that the plaintiff would be entitled to his commissions if the lease had been effected at, or before, the time when the Government officer, Major King, wrote that the property "would not meet any present need of the Department." The defendant contends that he had no communication with plaintiff between 15 December, 1917, and 8 February, 1918, when defendant addressed a letter to Major General Gorgas, who was Surgeon-General of the Army and stationed at Washington, D. C., calling his attention to the Sulphur Springs Hotel at Waynesville, N. C., as a suitable building for tuberculosis patients, while plaintiff contended that he continued to act for the defendant up to the very time when the trade was closed with the Government for a lease of the property, upon the conditions specified in the above statement of the case. One of the principal controversies between the parties is, whether plaintiff was retained to lease the property as a hospital for convalescents only, at $4,800 per annum, or as a hospital generally, that is, for all kinds of patients, without restrictions to convalescents, the place finally being leased for tubercular patients, at $10,000 with certain stipulations as to improvements to be made by the defendant and a Red Cross building to be erected by the Government. Defendant's improvements cost him between $4,000 and $5,000; the Red Cross building cost $12,000, and he bought it for $1,100. Defendant, therefore, contends that this was an entirely new contract, proposed and initiated by him, in his letter of 8 February, 1918, to General Gorgas, and thereafter conducted by him, without aid from Campbell, to the end, while the plaintiff asserts

that it was but a part of one continuing transaction, and that it was his personal efforts bestowed on the matter to bring about the lease that really caused it to be made. That he brought Major Bruns, who represented the Government, to the meeting at Waynesville where the negotiations were concluded, and that it really and mainly was because of adopting his suggestions as to the meeting that the negotiations became successful. The jury could reasonably find from the evidence that plaintiff's services contributed largely to the fortunate result of the Waynesville conference.

There was evidence to sustain plaintiff's allegation that there was no restriction as to the kind of hospital intended by the parties, and the jury must have found that there was none.

All these questions were properly submitted to the jury, and they have found for the plaintiff. Now as to the law governing the relation of these parties. The learned judge tried the case according to the principle applied in *Trust Co. v. Goode,* 164 N. C., 19, which is thus stated: "When an owner places land with a real estate broker for sale, he agrees, in the absence of any special contract, to pay the customary commission or brokerage, in case a sale is consummated with a purchaser, who was led to begin the negotiation through the intervention of the broker. It is immaterial that the owner, after the broker has interested the purchaser, secretly pursues the negotiations and himself completes the sale, or that the owner of his own accord effects a sale at a less price than that he gave the broker. If any act of the broker in pursuance of his authority to find a purchaser is the initiatory step that leads to the sale consummated, the owner must pay the commission. The procuring cause of sale is such intervention of the broker for that purpose as constitutes the foundation on which the negotiation is begun. The law is clear that a broker does not forfeit his commission because the owner avails himself of the services rendered to sell at a price less than that limited, and the owner's position is not improved if he seeks to fortify his evasion of liability by telling the broker after the rendition of the services he will pay no commission, if he (the owner) sells at such price." And again: "Where a broker authorized to sell at private sale has commenced negotiations, the owner cannot, pending the negotiations, take it into his own hands and complete it, either at or below the price limited, and then refuse to pay the commissions," citing *Martin v. Holly,* 104 N. C., 36. According to this authority, the judge has strictly followed the correct precedents, for his language was identical, or at least substantially so, with that used in *Trust Co. v. Goode, supra.* The Court further said, and it also is pertinent to this case: "The decisions cited by the defendant (*Mallonee v. Young,* 119 N. C., 549; *Abbott v. Hunt,* 129 N. C., 403; *Trust Co. v. Adams,* 145 N. C., 161; *Clark v. Lumber Co.,* 158 N. C., 139) are based upon a different state of facts, and are

easily distinguished from this case as made out upon the plaintiff's evidence."

It is objected that the judge qualified the proposition, that the broker does not forfeit his commission because the owner, while availing himself of the broker's services, sells at a less sum than the specified price, referred to in *Goode's case* by this observation: "And the owner's position is not improved, if he seeks to fortify his evasion of liability by telling the broker after the rendition of the service, that he will pay no commission if he (the owner) sells at such a price." Here the defendant did not deny his liability to the broker for commissions until after the lease had been made, and it must be true that such a tardy repudiation of the agreement, which the jury found was made, will not affect the plaintiff's right to be compensated according to the contract. It came too late, and the defendant could not enjoy the benefit of the broker's services and refuse to pay for them. This is what the Court meant, when using the language taken from *Trust Co. v. Goode, supra.* As properly said in that case, *Trust Co. v. Adams, supra,* and the other cases cited with it above, are not in point. There we held that the services must result in a contract of sale, or lease, as the case may be, adding that, "Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts bring about no agreement, or contract, between his employer and the purchaser, by reason of his failure in the premises, the loss of expended and unremunerated effort must be all his own. He loses the labor and skill used by him which he staked upon success. If there has been no contract, and the seller is not in default, then there can be no reward. His commissions are based upon the contract of sale," citing *Sibbald v. Iron Co.,* 83 N. Y., 378. But here plaintiff's contention was that he rendered continuous service, which did result in the contract, and the jury so found, under a singularly clear-cut statement of the issues between the parties, and the evidence applicable thereto. The use of the term "evasion of liability," when considered with proper reference to its setting in the charge, if prejudicial at all, is not sufficiently so to induce a reversal of the judgment. *S. v. Smith,* 164 N. C., 476; *Brewer v. Ring,* 177 N. C., 476; 3 Graham & Waterman on Trials, 1235. There must be some substantial ground upon which a new trial is asked before it will be granted, as said in those cases, and not something that could have worked no harm to the appellant.

If the plaintiff's evidence is true, and the jury has so found, his services had very much to do with the good result achieved in the final negotiations with the Government's officer. The other exceptions are groundless.

We are of the opinion that this case was correctly tried, and therefore affirm the judgment.

No error.

BETTIE K. ENLOE, ADMX., v. SOUTHERN RAILWAY CO. ET AL.

(Filed 20 December, 1919.)

1. Railroads—Employer and Employee—Negligence—Personal Injury—Derailment—Evidence—Nonsuit—Trials.

The court will take judicial notice that a bull is an animal of a phlegmatic character not likely to be frightened or hastened in its movements by the ordinary signals of warning given by an approaching train; and where it is shown that the intestate of plaintiff, a fireman on the second engine of a double-header train, was thrown between the cab of the engine and the tender of his train by a derailment caused by running over a bull, the train moving about fifteen miles an hour, on a straight track about 300 or 400 yards from a curve in a cut the train had cleared; that a cow had just crossed the track, and the bull, quietly grazing 15 or 20 steps from the track, started to cross, running, when the train was 35 or 40 feet of the point of impact: *Held*, the mere fact that the whistle was not then blown, under the circumstances, in so short a time, is not sufficient evidence of negligence to be submitted to the jury, and a motion as of nonsuit was properly allowed.

2. Negligence—Res Ipsa Loquitur—Presumptions—Admitted Facts—Railroads—Derailments.

The doctrine of *res ipsa loquitur* from a derailment of a train, in a stock injury case, is inapplicable when it is not denied or controverted that the track and equipment, etc., were in good condition, and all the facts causing the accident are known.

CLARK, C. J., dissenting; HOKE, J., concurring in the dissenting opinion.

APPEAL by plaintiff from *Ray, J.*, at the June Term, 1919, of BUNCOMBE.

This is an action to recover damages for negligence resulting in the death of Lloyd Enloe, a fireman who was killed while at his post of duty and employed by the Southern Railway Company.

Plaintiff's intestate was killed about 12 o'clock m., on 9 May, 1917, at a point on the line of the Southern Railway Company about 300 yards west of Lake Junaluska Station in Haywood County. The deceased was twenty-one years of age, and the sole support of his mother and five small brothers and sisters. At the time of his death he was the fireman on the second engine in a double-header train going east from Waynesville, N. C., toward Asheville, N. C. The train was in charge of Captain L. E. Perry as conductor. The front engine was being run by Clint Burt, engineer, and O. H. Bradshaw, fireman. The second engine was in control of A. C. Enloe, engineer, and Lloyd Enloe, deceased, as fireman. The death was caused by a derailment of the engine, which occurred upon a straight track, about 300 or 400 yards east of where the train cleared a little cut, called the "White Cut," which was caused by the train running over a large bull, the property of Garrett Reeves.

The bull and a cow were grazing on the north side of the track, and when first discovered by O. H. Bradshaw, fireman on the front engine, the cow was wandering in the direction of the track. The fireman saw the cow and the bull shortly after the train cleared the cut. The cow went toward the track and passed across the track ahead of the train. The fireman went over from the left to the right-hand side of the cab to see if the cow had passed over in safety, and when he went back to the left-hand side he saw the bull look up and go straight toward the track, and there met the train, causing the wreck. The collision of the train with the bull derailed the engine. The deceased was caught between the cab in which he was riding and the tender containing the coal and water, and was burned by steam escaping from the boiler.

The bull was 15 or 20 steps from the track grazing when he started across, running, and the train was then within 35 or 40 feet of the point of impact running 15 miles an hour.

The evidence of the plaintiff is that the roadbed was in good condition, and that from the time the bull started across there was no time to give a signal or to do anything else to avert the injury. There was evidence that no whistle was blown. At the conclusion of the evidence judgment of nonsuit was entered, and the plaintiff excepted and appealed.

Wells & Swain for appellant.
Martin, Rollins & Wright for appellee.

ALLEN, J. The evidence for the plaintiff shows that the bull, which was the cause of the accident, was fifteen or twenty steps from the railroad track, grazing quietly, until the train was within 35 or 40 feet of the point of impact, and that he then started across the track, and was run over and killed, causing a derailment of the engine, which brought about the death of the plaintiff's intestate.

It is also in evidence that the train was running fifteen miles an hour, and that not more than one or two seconds elapsed after the bull started to the track, and that within this time the train could not have been stopped, nor could anything else have been done to avert plaintiff's injury and death.

If so, the liability of the defendant, if any, depends on what occurred before this time, and there is evidence that the bull could have been seen when the train was 300 or 400 yards distant, and that the whistle was not blown, and it is upon this last circumstance the plaintiff relies for a recovery.

A review of the cases in which damages have been recovered for killing animals because of failure to sound a whistle will demonstrate that the animals were either on the track, or indicating by their action they

would probably go on, or so close that from the excitable nature of the animal they might be expected to do so, and it is not made the absolute duty of the railroad company to sound the whistle in all cases, when the animals are near the track.

In the *Snowden case,* 95 N. C., 97, the horse was three feet from the track, and it was held that precautions ought to have been taken to avoid the injury, taking into consideration that it was a nervous animal, and the Court quotes with approval the following from *Wilson v. R. R.,* 90 N. C., 69: "It may be conceded that when cattle are quietly grazing, resting, or moving near the road, not on it, and manifesting no disposition to go on it, the speed of the train need not be checked; but the rule is different when the cow or mule is on the road, and runs on, then off, along, near to, and back upon it. In such case reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and, if need be, to stop it, until the danger shall be out of the way."

The *dog case,* 136 N. C., 554, and the *turkey case,* 163 N. C., 34, are also illustrations of the principle that the known character of animals may be considered in determining what precautions should be taken to avoid injury, but the latest and one directly applicable is the *goose case,* 166 N. C., 572.

In that case the action was to recover damages for killing geese, and in sustaining a motion for judgment of nonsuit, the Court said: "The mere fact that the whistle was not sounded nor the bell rung, if such was the fact, is not sufficient evidence, taken alone, to have gone to the jury in this case.

"The plaintiff relies upon the 'turkey case,' *Lloyd v. R. R.,* 163 N. C., 33. But the two cases are very dissimilar. . . . The turkey is a nervous fowl, and the jury might well have found that if the whistle had been blown the turkeys would have taken wing or have run, and therefore we held that it was error to enter a nonsuit.

"Geese, however, are phlegmatic and slow of movement, and the blowing of the whistle or ringing the bell would not be calculated to make them run or fly. On the contrary, the approach of the train would be more likely to cause them to huddle up in conference or to stretch out their necks to oppose the passage of the engine. In the absence of evidence showing circumstances of actual negligence, the mere fact that the whistle was not blown or the bell rung did not authorize the court to submit the case to the jury. . . . For all that appears, the geese waddled on the track just ahead of the engine. But if it were shown that they were on the track when the engine was 300 yards off, yet from the nature of the fowl is there any reason to assume that if the signal had been given they would have gotten off the track in time? They

have too much dignity or are too combative to flee promptly from danger. Besides, as Mr. Cooper well observed in his argument, 'Can the engineer determine what are the negotiations of a flock of geese in a field, or even on the track, when they got their heads together?'

"The difference between the characteristics of a turkey and of a goose is a matter of common knowledge. The turkey is long-legged, quick of movement, and promptly responsive to a signal of danger. The goose is short-legged, slow to fly or run, and resentful rather than appreciative of a warning of danger."

The goose is "phlegmatic," which Webster defines as "not easily excited to action," and so characteristic of the bull is the refusal to yield to warning, persuasion, or force that the word "bull-headed" is accepted in ordinary conversation and by lexicographers as the synonym of "headstrong," "obstinate," "stupidly stubborn."

The sounding of the whistle would in all probability have been regarded as the challenge for battle, and certainly there is nothing in the record permitting the inference that it would have deterred the bull from going on the track.

The doctrine of *res ipsa loquitur* usually arising from the derailment of a train does not apply, because the track was in good condition, and all the facts causing the accident are known. 29 Cyc., 592; *Orr v. Rumbough*, 172 N. C., 760.

The intestate of the plaintiff has been the unfortunate victim of a most regrettable accident, for which, however, the defendant is not responsible.

Affirmed.

CLARK, C. J., dissenting: The plaintiff's intestate was killed while on duty as a fireman on the second engine of a double-header train. He was 21 years of age, and the sole support of his mother and five small brothers and sisters. He was killed in the derailment of the engine, which is *prima facie* proof of negligence on the part of the company, and it was error to enter a nonsuit if the evidence upon the most favorable aspect thereof, or with the inferences which could be drawn therefrom by a jury, did not as a matter of law rebut the presumption of negligence.

In *Marcom v. R. R.*, 126 N. C., 200, it was held: "Where the derailment of the engine resulted in the death of the intestate, a fireman in the employment of the defendant, a *prima facie* case of negligence is to be inferred, and the burden is thrown upon the defendant to disprove negligence on its part." This has been cited and approved in numerous cases cited at the end of that case in the Anno. Ed., and more recently in *Ware v. R. R.*, 175 N. C., 508; and in *Wallace v. Power Co.*, 176 N. C.,

562. The same principle is approved, 29 Cyc., 599; L. R. A., 1917, E, 143n, and 213n, and *ibid.*, 123n, and *Battle v. Lumber Co.*, 179 N. C., 112. Rev., 2645, also makes killing the bull presumptively a negligent act.

The train was going east and the death was caused by the derailment of the engine upon a straight track about three or four hundred yards east of where the train had cleared a little cut, and was caused by the train running over a large bull. The bull and cow were grazing on the north side of the track when first discovered by the fireman on the front engine; the cow was then going in the direction of the track. The fireman saw the cow and the bull as soon as the train came out of the cut. The cow was then going towards the track and crossed it. The fireman seeing that the cow had crossed in safety went to the other side and saw the bull look up and going straight towards the track, where the train struck him, causing the wreck.

The deceased was caught between the cab in which he was riding and the tender containing the coal and water and was burned by steam escaping from the boiler—a most painful and horrible death.

It is also in evidence that the train was running 15 miles an hour, and though there was evidence that the train could not have been stopped in time to avoid the collision, it has been held by this Court that the time within which a train can be stopped is a matter of which the jury may take cognizance as a matter of everyday observation.

However, the negligence of the defendant does not depend upon failure to stop the train, but when the cow was seen 400 yards off in a few feet — 15 or 20 steps from the track, and immediately afterwards the bull was seen following her, it was for the jury to say whether it was not negligence to fail to make him quicken his steps, or to divert him from crossing, by giving frequent blasts of the whistle and turning off the exhaust steam. On the contrary, it was in evidence by defendant's employees that no precaution was taken to prevent a collision with this big, heavy animal, either by slackening speed or blowing the whistle or turning off the exhaust steam, by which means the jury might have found that the animal could have been hastened when passing the track, or diverted from so doing.

There being a presumption of negligence from the derailment, which does not happen without a cause, it devolved upon the defendant to rebut this presumption, and prevent the frightful death which the young fireman suffered by being scalded to death by the steam while being crushed between the cab and the tender.

Bradshaw, the fireman on the front engine, testified that the bull was struck by the train three or four hundred yards east of the "White" cut, on a clear straight track, and without any intervening obstacles to obstruct the view of the engineer and fireman on the engine in front. And

that he actually saw both animals starting towards the track when the train was about 400 yards away, and they were then 15 or 20 steps from the track. He further testified that no signal or warning was given.

Captain L. E. Perry, the conductor in charge of the train, testified that no stock signal was sounded and no warning given. When asked what was the duty of the engineer when he observes cattle on the track, or about to go on the track, he replied that it was his duty to use all means in his power to keep the train from striking the cattle, and that they usually give what is called the stock signal, and also open the cylinder cocks (*i. e.,* turn on the exhaust steam) and scare them, by that means and by his whistle. J. A. Cook, another employee of the defendant, testified that the method used for frightening livestock away was by blowing whistles, short, quick, loud blows.

This Court has often held that where the train is running upon a straight part of the roadbed in daytime, and cattle feeding near and crossing the road are actually killed by the locomotive it is negligence if the speed of the train was not lessened nor the usual mode of driving off stock by blowing the whistle and turning on the exhaust steam was not resorted to. *Snowden v. R. R.,* 163 N. C., 33; *Hines v. R. R.,* 156 N. C., 222; *Ramsbottom v. R. R.,* 138 N. C., 839; *Moore v. Electric Co.,* 136 N. C., 554; *Wilson v. R. R.,* 90 N. C., 69; *Laws v. R. R.,* 52 N. C., 468; *Aycock v. R. R.,* 51 N. C., 231.

Moreover, in this case the plaintiff's intestate riding upon the second engine, and having no control whatever over the movements of the train, was entitled to the same protection under the law as a passenger.

The evidence is that the animal was seen by the fireman from the train when it was 300 or 400 yards distant, and on a nonsuit the latter figure must be taken, and by the same rule the evidence that the bull was 15 or 20 steps from the track when he started across, running, must be taken at 15 steps. By proper and prompt use of the whistle he certainly could have been hastened up to run 15 steps while the train was running 400 yards.

It is argued that there was a slight curve and the engineer could not from his side of the cab have seen the animals, but there is evidence that the fireman did see them, and furthermore, in *Arrowood v. R. R.,* 126 N. C., 631, where this very objection is raised, the road was winding (and here it was nearly straight and a full view clear ahead), and the Court said, as to the duty of keeping a lookout: "On a straight track, the careful lookout of the engineer would ordinarily be sufficient, but on a winding mountain track, turning first to the right, then to the left, if the engineer could not see the track when the engine turned to the left, then it was his duty to have the fireman to look out forward on that side. The duty of keeping the lookout is on the *defendant.* If it

can keep a proper lookout by means of the engineer alone, well and good. If by any reason a proper lookout cannot be kept without the aid of the fireman, he should also be used. If by reason of their duties, either the fireman or the engineer, or both, are so hindered that a proper lookout cannot be kept, then it is the duty of the defendant, at such places on its road, to have a third man employed for that indispensable duty. In *Pickett v. R. R.*, 117 N. C., 634; *Lloyd v. R. R.*, 118 N. C., 1012, and a long line of similar cases, it is held that it is the duty of the defendant to keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give will relieve the company, if that lookout is not a proper lookout." This case has been often cited. See Anno. Ed.

There is a very widespread and steadily growing consensus of opinion that the simplest justice requires that when an employee is killed, or injured, while in the discharge of his duties in a dangerous employment like this, and when there is an entire absence, as in this case, of any negligence whatever on his part, that the loss should be taxed against the great industry which he is serving, and not fall solely upon those dependent upon him. For this reason "Employees' Compensation Acts" have been enacted in nearly all the States, requiring compensation to be paid by the employing company even though the employee was negligent. Under the Federal Government, and in this State the statute now provides that even if the employee concurs in the negligence which caused his death or injury, this is not a complete defense, but the loss shall be prorated in proportion to the negligence of the employer and employee. Here there was no contributory negligence.

The derailment being of itself *prima facie* negligence, and the burden being upon the defendant to rebut it, the fact that the two cattle were seen 400 yards off when the freight train was moving only 15 miles an hour, that the cow was then seen moving towards the track, and that her companion would naturally be expected to follow, and could with proper outlook have been seen to do so, and when, after a short delay in further observation, he was seen to be doing so, it was evidence of negligence that this latter observation was not made sooner, and that the whistle or steam exhaust was not used to hasten his crossing or to turn him aside. Certainly there was no evidence whatever to rebut the double presumption of negligence arising from the derailment, and under Rev., 1645.

It took the train, running 15 miles an hour, nearly a full minute or 60 seconds to make the 400 yards before it overtook this animal, who would hardly have taken as long a time as that to make the 15 or 20 steps from his position to the point on the track where the train struck

him, if his steps had been hastened by sharp blows of the whistle repeatedly given, and the exhaust of steam.

Certainly this much effort ought to have been made to save the life of a human being upon whom a family was dependent, and to save him from the excruciating agonies of being scalded by escaping steam. The jury at least should have had opportunity to pass upon the question whether the presumption of negligence raised by the fact of the derailment was rebutted.

HOKE, J., concurs in this dissenting opinion.

MINNIE FAGG MALLOY v. BLANCHE ACHESON.

(Filed 20 December, 1919.)

1. Estates—Remainders—Contingent Interests—Deeds and Conveyances.

A testator devised lands to his daughter M., and adopted daughter B., the only child of his brother H., for life, then to their children, the issue of any deceased child to take the share its parents would have taken if living; and if either of them should die without child or children, then to the child or children of the survivor of them; but should both die without issue, then to H. and his heirs forever. M. had one child who died intestate without issue; B. has two living children, of age and unmarried, the others having died intestate and unmarried; H. is dead, leaving B., his only child, surviving him, and brothers and sisters. B. and her husband and her two children executed a deed to all their interest in the lands to M., now a widow, who executed a deed sufficient in form to the defendant, who refused to comply with his contract to take the land, alleging a defect in the fee-simple title he had purchased. The question as to the possibility of M. and B. having children yet to be born being waived, it is *Held*, M., her husband being dead, inherited the interest of her deceased son, and acquired the interest of B. and her children under their deed; and H., the ulterior contingent remainderman, being dead, and his only heirs have joined in the deed: *Held*, that the interest of all parties were concluded by the deed, and it passed an absolute fee-simple title.

2. Estates— Remaindermen— Contingent Interests— Ulterior Devisees— Uncertain Event—Deeds and Conveyances.

Where an estate is devised upon the contingency of death without issue, and there is also an ulterior devisee designated to take upon the death of the contingent remaindermen without issue, such ulterior devisee being certain, though the event upon which he is to take is uncertain, his estate, though it remains contingent, is transmissible by descent to his heirs, and where there is only one child of such ulterior devisee, a deed made by such child after his death is sufficient to pass his interest in the estate.

3. Estates—Remainders—Contingent Interests—Happening of Event—Descent and Distribution—Deeds and Conveyances.

A devise to the testator's two daughters, M. and B., contingent upon their having issue, M. now a widow, had one son who died unmarried and intestate, and B., her husband, and two children conveyed their interest to M.: *Held*, a fee simple absolute under the deed joined in by all parties in interest was conveyed by the deed, the possibility of M. and B. having children in the future being the only contingency left, and this having been waived by the consent of the parties.

CIVIL ACTION, tried before *Finley, J.*, and a jury, at November Term, 1919, of BUNCOMBE.

This action was brought in the court below for the purpose of enforcing specific performance of a written contract entered into by the parties to this action, under which defendant agreed to purchase from the plaintiff certain real estate in the city of Asheville, and the plaintiff agreed to convey the same to the defendant absolutely in fee simple. The defendant answered and admitted the execution of the contract, but alleged that the plaintiff was not seized in fee simple absolute of the property contracted to be conveyed, and could not convey an indefeasible title to the defendant, and alleged that the defendant refused to accept the plaintiff's conveyance and pay the purchase money for that reason. The case was heard on an agreed statement of facts, which is as follows:

1. M. J. Fagg, of Buncombe County, North Carolina, died on 31 January, 1894, leaving a last will and testament, bearing date 21 February, 1882, and a codicil thereto, bearing date 11 February, 1890, both of which were duly probated and recorded in the office of the clerk of the Superior Court of Buncombe County, North Carolina, and copies of which are hereto attached and made a part of this statement of facts. That the land described in the complaint in this action is a part of that devised to Minnie M. Fagg in Item V of said will.

2. M. J. Fagg was survived by his widow, Asenath M. Fagg, who died 20 July, 1895, by one daughter, Minnie M. Fagg, and one adopted daughter, Bessie Fagg Maxwell, and said M. J. Fagg left surviving him no other child or adopted child, or the issue of such other child, or adopted child.

3. Minnie M. Fagg, on 21 December, 1892, married T. F. Malloy, and had one child, Fagg Malloy, who was born 16 October, 1893, and died intestate, unmarried, and without issue, 22 October, 1918. T. F. Malloy died 31 March, 1915.

4. Bessie Fagg Maxwell, adopted daughter of M. J. Fagg, is the daughter of Henry C. Fagg, a brother of said M. J. Fagg, and was married to her husband, Wallace F. Maxwell, in the year 1889, and has had five children, three of whom have died, unmarried, and without issue,

and two of whom, Lois Maxwell and Marcella Maxwell, are now alive and unmarried, and more than twenty-one years of age.

5. Henry C. Fagg, a brother of M. J. Fagg, died 21 June, 1913, leaving no widow, or children, or issue of such surviving him, other than his said daughter, Bessie Fagg Maxwell, and her children. That said M. J. Fagg was also survived by sisters and brothers other than Henry C. Fagg, or the issue of such, some of whom are still living and others of whom have died leaving issue.

6. On 8 July, 1919, Wallace F. Maxwell and wife, Bessie Fagg Maxwell, Lois Maxwell, and Marcella Maxwell executed and delivered to Minnie Fagg Malloy a deed of conveyance for all their interest, present and prospective, in the land described in the complaint in this action, said deed being duly recorded in the office of the register of deeds for Buncombe County.

7. It is expressly agreed by the parties hereto, that the defendant is making no objection to the title to the land described in the complaint by reason of any interest contingent or otherwise, in said property, of any child of Minnie Fagg Malloy or Bessie Fagg Maxwell that may be born hereafter, and if the court shall be of the opinion that said Minnie Fagg Malloy is the owner of the land described in the complaint, in fee simple, subject only to be divested in whole or in part on the birth of any such child, then judgment shall be entered in this action in favor of the plaintiff.

Under item 5 of the will the testator devises the property in question to his daughter Minnie, the plaintiff herein, upon certain conditions and stipulations set out in items 3 and 4 of the will, which are as follows: "To have and to hold to her during her natural life, and at her death to such children as shall or may be born to her in lawful wedlock, the issue of any deceased child to take the share its parent would have taken had they been living." There is a similar provision as to Mrs. Maxwell.

The only other portion of the will material to this controversy is item 9, which reads as follows: "In case that either Minnie or Bessie should die without child or children, then I devise the property that would have gone to such child or children, had such been born, to the child or children of the survivor of them, and in case both of them should die without issue, then the same is devised to my brother, Henry C. Fagg, and his heirs forever."

The deed mentioned in the agreed statement of facts conveys to the plaintiff "all of their (the grantors') right, title, interest, and estate, claim and demand of every kind and nature, present or prospective, which they have or may hereafter have under the will of the late M. J. Fagg, or otherwise in and to" (the property). It being the intention of this deed to convey any and all present and prospective, vested or

contingent, interest of the parties of the first part in and to that portion of the property of M. J. Fagg lying between North Main Street and Merrimon Avenue in the city of Asheville, . . . and which has not heretofore been sold.

Upon these undisputed facts the plaintiffs contends that she is the owner of the land described in the complaint on two grounds:

First. Upon the birth of the plaintiff's son, Fagg Malloy, the remainder over after the life estate of the plaintiff became vested in him, and upon his death this vested remainder passed to his mother as his heir at law.

Second. That if the remainder of Fagg Malloy was contingent on his surviving his mother, then the plaintiff acquired the remainder over after her life estate, if not by descent from him, then by the deed from her adopted sister, Bessie Fagg Maxwell, and her husband and two children, Mrs. Maxwell being also the only child and heir in law of Henry C. Fagg, the ultimate remainderman.

The defendant contends:

1. That the construction of the items of the will above quoted is controlled by section 1581 of the Revisal of 1905; that all the remainders are contingent upon the respective remaindermen surviving the life tenant, and that the plaintiff inherited nothing from her son on his death.

2. That the deed from Wallace F. Maxwell and others is not sufficient in form, and cannot, as a matter of law, convey any contingent interest of the grantors in the property in question.

3. That the brothers and sisters of Henry C. Fagg, or their issue, have or may have an interest in the property in the event of the death of both Mrs. Maxwell and Mrs. Malloy without issue surviving, as they, the said brothers and sisters, or their issue, would then take as the heirs at law of Henry C. Fagg, the ultimate remainderman.

The court gave judgment for the plaintiff, and the defendant appealed.

Martin, Rollins & Wright for plaintiff.
Ruffner Campbell for defendant.

WALKER, J., after stating the case as above: We have stated only such provisions of the will as relate to the question presented for our decision. The discussion before us took a wide range, and embraced some matters which we do not deem it necessary to consider. We have been favored with a very able and learned argument on both sides, and have been greatly aided thereby in reaching our conclusion, which we will now state.

It appears in the record that every person who has any interest in the land, whether vested or contingent, is a party to the deed, the efficacy of which to pass an indefeasible title to the grantee is the question now before us. Marcellus J. Fagg, the testator, devised his property to his wife for life, for the joint benefit and use of herself and his daughter, Minnie Fagg, and his adopted daughter, Bessie May Fagg, the only child of his brother, Henry C. Fagg; and, subject to this life estate, he then devised certain property to his daughter and adopted daughter for life, and then to their children, the issue of any deceased child to take the share its parent would have taken if living, and he next provided that if either of them should die without child or children the property that would have gone to such child or children, had such been living, should go to the child or children of the survivor of them, and finally he willed that in case both of them should die without issue the property should go to his brother, Henry C. Fagg, and his heirs forever. Mrs. Minnie Fagg Malloy has had one child, Fagg Malloy, who died intestate and without issue, and Mrs. Bessie Maxwell, the adopted daughter, has two living children, both of age and unmarried, three of her children having died intestate and without having married. The husband of the plaintiff died in 1915. Henry C. Fagg died in 1913, leaving only one child and daughter, Bessie Maxwell, surviving him. He also left brothers and sisters. The deed was duly executed by Mr. and Mrs. Maxwell and their two daughters to the plaintiff, Minnie Fagg Malloy.

It can make no difference what interest Fagg Malloy, the son of the plaintiff, acquired in the land under the will, whether vested or contingent. He left no will, and had not conveyed his interest, and his only heir was his mother, who inherited his estate, whatever it was, at his death. If any interest will pass under the will to the children of Mrs. Maxwell, at the death of Mrs. Malloy without child or children, this interest is conveyed by the deed to the plaintiff, as the children of Mrs. Maxwell, Lois Maxwell and Marcella Maxwell, have joined in the execution of the deed, with their father and mother. So far all persons who have any interest under the will, or otherwise, anterior to Henry C. Fagg, have united in the execution of the deed. Now as to his interest. We will treat the case in this connection as if his interest is contingent, upon the death of both Mrs. Malloy and Mrs. Maxwell without child or children, and when so regarded, for the sake of argument, we find that the person who is to take under the will as the ulterior devisee is certain, though the event upon which he is to take may be uncertain, and in such a case, as we will show hereafter, his estate is devisable, descendable, transmissible, and assignable. His estate will remain contingent, as the event upon which it is to become vested and absolute has not happened. But, though it remains contingent, it is transmissible by

descent, and when he died it went to his heirs. He had only one, at the time of his death, and that one is Mrs. Maxwell, his daughter, and she is a grantor in the deed. Her joinder in it passes whatever interest she acquired by descent from her father, Henry C. Fagg, so that there is but a single interest left to be considered, and that is the one as to the possibility that Mrs. Malloy and Mrs. Maxwell may hereafter have a child, or children, and this possibility, while it exists in contemplation of law, is so remote that the parties have agreed to waive it.

We held in *Williams v. Biggs,* 176 N. C., 48, that "however we construe the devise, whether as vesting the estate absolutely in the survivors at the death of James A. Roberson, who died without issue, or as creating successive survivorships, the deed tendered by the plaintiff, who derived his right and title under a deed executed by the three surviving brothers for the land, will convey a good title to the defendant. This is true, because every one who could take an interest under the devise in the will has joined in the deed to certain grantees under whom the plaintiff claims title by *mesne* conveyance, and it is the same as if they had conveyed directly to the plaintiff. In any view of the case, the estate was vested absolutely either in all the surviving brothers, or ultimately will so vest in some one or more of them. If any one of them should die, leaving heirs, his share would descend to such heirs, who, though, would be bound by his deed. Of course, where the heirs, issue, or children are so designated as to take by purchase, under the terms of the will, there is no estoppel or rebutter as they do not take from their ancestor by descent, but directly from the devisor as purchasers. *Whitesides v. Cooper,* 115 N. C., 570. But whether all the sons die without issue or some die without leaving issue, and others die leaving issue, all parties have joined in the deed who have or will have the title to the land. The plaintiff has derived his title from parties who, if not owners of the land at the time they conveyed it to him, will eventually become the owners in fee simple absolute, and therefore all interest therein has passed to him. It follows that the deed tendered to the defendant will convey to him a good and indefeasible title." And the same was substantially held in *Hobgood v. Hobgood,* 169 N. C., 485, as will appear from this language of *Justice Hoke:* "Pattie Pippin having died without child or children or the descendants of such, the present estate in fee in the entire property is held and owned by Mollie Hobgood, defeasible at her death without child, etc., and in which event the property would go to the ultimate devisees, the Pippin nephews, and all of these having conveyed their interest, title, and estate to Mollie Hobgood, there is no reason, under the terms of the devise, why she should not presently take and receive the entire fund; our decision on the subject being to the effect that when the holders of a contingent estate are specified and known, they

may assign and convey it, and, in the absence of fraud or imposition, when such a deed is made, it will conclude all who must claim under the grantors, even though the conveyance is without warranty or any valuable consideration moving between the parties," citing *Kornegay v. Miller,* 137 N. C., 659.

In our case a valuable consideration was given for the deed. This Court, in *Kornegay v. Miller, supra,* states the doctrine as to the assignability of a contingent interest, and shows that a deed for such an estate, or interest, passes it by way of estoppel, or as an equitable right, which will be recognized and enforced. We refer especially to that case, as it states the principle very clearly and discusses it very fully, citing and reviewing the authorities. In *Fortescue v. Satterthwaite,* 23 N. C., 566, *Justice Daniel* thus refers to the doctrine: "It is true, as stated in the argument, that a possibility cannot be transferred at law. But by a possibility we mean such an interest, or the chance of succession, which an heir apparent has in his successor's estate. . . . Executory devises are not considered as mere possibilities, but are certain interests and estates. In *Jones v. Roe,* 3 T. T., 93, the judges seem to have considered it as settled that contingent interests, such as executory devises to persons who were certain, were assignable. They may be assigned, says *Atherly,* p. 555, both in real and personal estate, and by any mode of conveyance by which they might be transferred, had they been vested remainders."

Justice Ashe takes up the subject in *Bodenhamer v. Welch,* 89 N. C., 78, and discusses it with his usual learning and clearness. He says: "Randall Bodenhamer's interest was contingent, depending upon his surviving his mother. It was not, as contended, a mere possibility, but an estate in the land, an executory devise, or rather a contingent remainder, which is a certain interest. A possibility is defined to be 'an uncertain thing' which may happen, or a contingent interest in real or personal estate. Possibilities are divided into, first, a possibility coupled with an interest; this may of course be sold, assigned, transmitted or devised; such a possibility occurs in executory devises and in contingent, springing, or executory uses; and secondly, a bare possibility or hope of succession: this is the case of an heir apparent during the life of his ancestor; it is evident he has no right he can assign, devise, or release. 2 Bourvier Law Dict., 253. That executory devises, contingent remainders, and other possibilities, coupled with an interest, may be assigned is maintained in *Jones v. Roe,* 3 D. & E., 88; *Higden v. Williamson,* 3 P. Wms., 132; 2 Story, 630; *Comehys v. Vasse,* 1 Pet., 193; 7 Texas, 25; *Fortescue v. Satterthwaite,* 23 N. C., 566; and 3 Pars. Const., 475; Burrill Assign., 72; Shep. Touch., 239."

In *Kornegay v. Miller, supra,* at p. 668, the Court says that the assignee acquires an equitable title, not merely the right to enforce an executory contract, and this view is stated with great force in Bispham on Equity (6 ed.), 236, as follows: "The true ground upon which this and similar decisions are to be placed appears to be, that a court of equity enforces such assignments on the ground that the assignee is entitled to have specific performance of the contract to assign, as soon as the property comes into existence, in the hand of the assignor. But it must not be understood by this remark that the assignor's right is merely in the nature of a right to the specific performance of executory contracts, or is to be measured by the limitations by which that equitable remedy is controlled. The assignee's right is something more. It is a present title, not existent at law, but thoroughly recognized in equity; and to that title equity stands ready to give full effect the instant the property comes into being. It is true that neither in equity nor at law can a contract to transfer property, not then in existence, operate as an immediate and complete alienation, for the simple reason that there is nothing which can be immediately transferred. But instantly upon the acquisition of the thing, the assignor holds it in trust for the assignee, whose title requires no act on his part to perfect it. The assignee, therefore, has an equitable title from the time of the assignment." The decision in *Clark v. Cox,* 115 N. C., 94, is very much in point.

The case of *Burden v. Lipsitz,* 166 N. C., 523, is easily distinguished from this one (and from the cases cited by us where the deed was held sufficient to pass the contingent estate), because there the ulterior limitation was to the heirs of the devisor, and it was held that only those who could answer to that description when the contingency happened, and the estate vested, would take under the will, and not the heirs of the devisor at his death. It, therefore, was uncertain who those heirs would be, until the event had occurred which would vest the estate absolutely. This being the case, the deed was held not sufficient to pass an indefeasible title, as it could not then be determined whether all the persons who might have an interest in the land had joined in the deed. But here the ulterior devise is to a person who is certain, viz., Henry C. Fagg. If he had survived and joined in the deed it would be clear that his title or interest, though contingent, passed to the plaintiff, Mrs. Minnie Fagg Malloy. His interest or estate, which came to him under the will, contingent though it was, descended, at his death, to his sole heir, Mrs. Maxwell, who was his daughter, and she took it, not under the will, but by descent (*Whitfield v. Garris,* 134 N. C., 24), as we have said. Her joinder in the deed, as one of the grantors, was as efficacious to pass the contingent interest, which her father took under the will and she ac-

quired by descent from him, as would his deed have been for the same interest had he lived. This follows because the interest which the father got under the executory devise, though contingent, or a possibility coupled with an interest, could, as said above, be sold, assigned, transmitted by descent, or devised. It descended to the daughter, Mrs. Maxwell, when Henry C. Fagg died (*Kornegay v. Morris,* 122 N. C., 199), and was assignable by her, and whoever will succeed her in the line of descent from her father will be bound and concluded by her deed.

The case of *Isler v. Whitfield,* 61 N. C., 492, relied on by the defendant, is materially different from this case. There the devise of the land was to a grandson, and, if he died without heirs of his body, to go over; it was held that the first taker and the grandson could not convey a good title, because there was an alternative class to take under the last limitation, namely, the grandchildren generally of the testator, and all of them were not parties to the deed, and were not bound by the deed of the specified grandsons. That is not our case. *Burden v. Lipsitz, supra,* likewise relied on, is also different, for there the ultimate limitation was to the testator's own heirs, which, it was held, could not be determined until the contingency had happened at the expiration of the life estate. The heirs there took by purchase, or under the will, and not by limitation, while here the devise over is to Henry C. Fagg, and his heirs, and the word heirs is one of limitation, and not of purchase, and the estate of Henry C. Fagg, therefore, descended to his only heir, who was Mrs. Maxwell, and her deed concludes those who will come after her in the line of descent, as we have shown. The ulterior devisee, Henry C. Fagg, was a certain person designated to take, while the event upon which the vesting of his estate depended was uncertain. When he died his estate, if vested or contingent, descended to his heir, who took under him and not under the will. *Clark v. Cox,* 115 N. C., 94, where the principle is fully discussed by *Shepherd, C. J.*

So far we have dealt with the case upon the assumption that there may be contingent interests to be taken into account in passing upon the title to the land. We will now consider it in the other view presented by the plaintiff, that the estates of the children of Mrs. Malloy and Mrs. Maxwell were vested and absolute interests at the birth of each child, and that the devisor did not intend a dying without issue living at the death of Mrs. Malloy and Mrs. Maxwell, but a dying without having had such issue, and as each of them have had issue, the limitations over to the children of the survivor have failed. In this view, when Fagg Malloy died, his vested interest went to his mother, his father being dead, and the other interests of Mrs. Maxwell and her children also vested, and passed to Mrs. Malloy by the deed. If the estate is such as would open to let in the interests of any after-born children of Mrs.

Malloy and Mrs. Maxwell (*Irvin v. Clark,* 98 N. C., 437), this is provided for by the agreement of the parties to waive any defect in the title arising out of the possible birth of any such children. The conclusion here is that if the interests are all absolutely vested, and the limitation over to Henry C. Fagg therefore has failed, by the birth of children to Mrs. Malloy and Mrs. Maxwell, the deed will pass a good title to the purchaser.

We have refrained from passing on the controversy of the parties as to whether the estate was vested absolutely in Mrs. Malloy and Mrs. Maxwell and their children, when born, or whether there is a contingent interest in the children of Henry C. Fagg, as it is not necessary to do so in order to decide the only question before us, which is: Will the deed convey a good title? whether the interests are vested or contingent, and we are of opinion that in either case it will, under the principles we have stated.

Affirmed.

JAMES J. BAILEY, JR., v. FANNIE BAILEY MITCHELL ET AL.

(Filed 20 December, 1919.)

1. Judgments—Estoppel—After Acquired Property—Tenants in Common—Parties.

Where the four children and heirs at law of a fifth child were tenants in common of the lands of their deceased father, and in proceeding to partition the lands among themselves and a purchaser from one of them, all persons in interest had been made parties, the adjudication in a former adverse action, in which the heirs at law of the deceased child had not been made parties, that the interest of each was an undivided one-fourth, will not conclude the court, in the present proceedings, as to the one-fifth interest not formerly represented, or estop one of the children from showing that he had subsequently acquired the interest of two others of them as formerly ascertained, proportionately reduced to the extent of the additional interest presently represented.

2. Instructions—Evidence—Deeds and Conveyances—Tenants in Common.

Where a purchaser from a tenant in common of lands, sets up, in partition proceedings, that he is also the sole owner of a definite part thereof under a deed, and it is controverted whether the deed covered only this separate part, a requested instruction to the effect that the purchaser was the owner in fee of this particular land, and not a tenant in common with the others, in the entire tract, is properly refused.

CLARK, C. J., concurring.

APPEAL by defendant from *Ray, J.,* at the June Term, 1919, of BUNCOMBE.

This is a proceeding for the partition of land.

James Bailey, Sr., died on.....day of....., seized in fee of said lands, which were afterwards designated on a certain map as B, C, and D, leaving surviving him the following heirs: (1) James J. Bailey, a son; (2) Aisley Bailey-O'Neal, a daughter; (3) Charlotte Bailey-Scales, a daughter; (4) Ellen Hall, the only daughter of Ellen Smith, the deceased daughter of James Bailey, Sr.; (5) Fannie Bailey-Mitchell, a grandchild, and five others, the last six children and heirs at law of Jones Bailey, the deceased son of James Bailey, Sr.

Afterwards a proceeding was instituted to foreclose a tax lien under which the defendant, Justice, took a deed, which he claims conferred title on him to lot D.

He also bought the interest of Ellen Hall and took deed therefor under which he claims a one-fourth interest in said lands.

Afterwards James Bailey, Jr., brought an action against the defendant Justice to recover possession of a part of said lands, and in this action a judgment was rendered in March Term, 1917, in Buncombe Superior Court, adjudging that James Bailey, Jr., was the owner of an undivided one-fourth interest of said lands, Aisley O'Neal to an undivided one-fourth, Charlotte Scales to an undivided one fourth, and the defendant Justice to an undivided one-fourth.

An appeal was taken from this judgment by the defendant Justice, and the judgment was affirmed. See 174 N. C., 754.

James Bailey, Jr., then bought the interest of Aisley O'Neal and Charlotte Scales, two of the heirs, and this proceeding for partition was instituted, to which the heirs of Jones Bailey, who were not parties to any of the former actions or proceedings, were made parties defendant.

The defendant Justice moved for judgment upon the pleadings, which was denied, and he excepted.

He also requested his Honor to give the following exception to the jury, which was denied, and he excepted:

"That as to lot D the same remained as a part of the estates of James Bailey, Sr., undisposed of until one Mooney brought a proceeding in the Superior Court of Buncombe County to foreclose a tax lien on said lot, and that said Mooney caused a summons from said court to be served on said defendants named therein, and duly verified and filed his complaint in said action. And thereafter duly obtained judgment by default for the want of an answer in said action, decreeing a sale of said lot and appointing a commissioner, one D. M. Luther, to make the sale; that the said commissioner duly made sale to defendant Justice, and executed to him a deed for said lot. And that by virtue of the said action and the proceedings therein, and the said deed of conveyance, the said defendant became the owner in fee simple and seized in fee thereof."

The jury returned the following verdict:

"1. Are the plaintiff and defendant tenants in common of the lands described in the petition as lots 'B' and 'C'? Answer: 'Yes.'

"2. What is the interest of the plaintiff, James J. Bailey, in said lands? Answer: 'Three-fifths (3/5).'

"3. What is the interest of the defendant, W. T. Justice, in said lands? Answer: 'One-fifth (1/5).'

"4. What is the interest of the heirs at law of Jones Bailey in said lands? Answer: 'One-fifth (1/5).'

"5. Are the plaintiff and defendant tenants in common of the lands described in the petition as lot 'D'? Answer: 'Yes.'

"6. What is the interest of the plaintiff, James J. Bailey, in said lands? Answer: 'Three-fifths (3/5).'

"7. What is the interest of the defendant, W. T. Justice, in said lands? Answer: 'One-fifth (1/5).'

"8. What is the interest of the heirs at law of Jones Bailey in said lands? Answer: 'One-fifth (1/5).'

"9. Did the defendant, W. T. Justice, enter upon and damage the said lands, as alleged in the reply? Answer: 'No.'

"10. If so, what is the amount of said damage? Answer: 'No.'

"11. What amount, if any, is the defendant, W. T. Justice, entitled to recover for the alleged payment of taxes by him of lot 'D'? Answer: 'No.'

"12. Were the defendants, James J. Bailey, Jr., and his mother, Rebecca Bailey, served with the summons in the case entitled J. Mooney v. James J. Bailey, Jr., and Rebecca Bailey, brought to the July Term, 1901, of the Superior Court of Buncombe County? Answer: 'No, as to J. J. Bailey, Jr.'"

Judgment was entered in accordance with the verdict, and the defendant Justice appealed.

Mark W. Brown for plaintiff.
W. P. Brown for defendant.

ALLEN, J. The motion of the defendant Justice for judgment upon the pleadings is upon the ground that as James Bailey bought the interest of his two sisters after the former judgment in which it was adjudged that James, Aisley, Charlotte, and Justice was each entitled to a one-fourth interest in the land; that he was estopped to deny that he, Justice, was the owner of such one-fourth interest, and for this position he relies on *Carter v. White,* 134 N. C., 466, but this is a misapprehension of that decision.

In *Carter v. White* it was adjudged in an action of trespass that the defendant was the owner of one-fifty-fourths of a tract of land, and the

plaintiffs the owners of fifty-three-fifty-fourths thereof, and it was held in a subsequent proceeding for partition that this judgment estopped the defendant from setting up an after-acquired outstanding title, which, if allowed, would have defeated the effect of the former judgment, while in this action James Bailey has simply bought the shares of his two sisters as they were adjudged to be in the former action, and his purchase in no way affects the defendant Justice.

Again, the heirs of Jones Bailey were not parties to the former action, and cannot be bound by the judgment rendered therein, and the effect of the present judgment is to superimpose their interest on the shares of James Bailey and Justice alike. In other words, the former judgment was rendered upon the fact as it then appeared, that there were only four heirs entitled to share in the estate, and in this judgment this error of the parties is corrected by giving the representatives of the fifth heir their share.

The instruction which his Honor refused to give was properly denied, as it was equivalent to a peremptory instruction to the effect that the defendant Justice was the owner of lot D under the deed secured in the proceeding to foreclose the tax lien, when it was a controverted question as to whether the deed covered lot D, and it seems to have been adjudicated in the former action that it did not do so.

Judge Walker says in the former opinion, 174 N. C., 754: "He recovered the one-fourth interest claimed by him, as the verdict and judgment will show, but the presiding judge was of the opinion, and so held, that he had not offered evidence sufficient to locate the land bought by him at the tax foreclosure sale."

It is is also found by the jury that James Bailey was not served with summons in the foreclosure proceeding and the heirs of Jones Bailey were not parties thereto.

These are the only exceptions discussed in the brief of counsel, and upon the whole record we find

No error.

CLARK, C. J., concurring: In *Carter v. White,* 131 N. C., 14, it was held by *Cook, J.,* for a unanimous Court, that a "judgment in partition proceedings allotting a defendant his share in severalty does not prevent his claiming an undivided interest with the plaintiff under an after-acquired title from one not a party to the action, in an ejectment or partition proceedings." On another appeal in the same case, *Carter v. White,* 134 N. C., 466, the former decision was overruled by a divided Court, it being then held that "A judgment in a partition proceeding determining the respective interests of parties thereto is binding on said parties as against an after-acquired title." It has been held in *Harrison*

v. Ray, 108 N. C., 215; 11 L. R. A., 722; 23 Am. St., 157, that "in voluntary actual partition the deeds convey no title, but simply ascertain by metes and bounds the interest of each." This has been often cited since. See cases in 134 N. C., at p. 480, and in citations to that case in Anno. Ed.

In 21 A. and E., 1193, it is said that, "Both in voluntary and judicial partition the decree does not create or divest any title to or other right in the property, but merely severs the unity of possession and determines the share which each tenant is entitled to possess in severalty."

Practically, though not expressly, the first decision in *Carter v. White,* 131 N. C., 14, has been reinstated in *Weston v. Lumber Co.,* 162 N. C., 169-173. This last case has been cited with approval in *Olds v. Cedar Works,* 173 N. C., 166-167, and *Stallings v. Walker,* 176 N. C., 323.

But, independent of that, *Carter v. White* has no application to this case, for here Jones Bailey and his children were not parties to the former proceeding in partition, and are not bound thereby. They have not been deprived by the former proceeding of their interest in this land, and have a right to have their one-fifth interest now allotted and set apart; to be superimposed, so to speak, upon the former partition, which will result in taking one-twentieth from W. T. Justice, who was formerly allotted one-fourth of the land; and four-twentieths from James J. Bailey, who, claiming under the former partition, was entitled to three-fourths, which is now reduced by the claims of the heirs of Jones Bailey to three-fifths; while the former allotment of one-fourth, which Justice holds under the former partition, will be reduced to one-fifth.

JOHN E. PATTON v. SINCLAIRE LUMBER COMPANY.

(Filed 20 December, 1919.)

1. Contracts—Written Instruments—Parol Evidence—Merger.

All the various steps of a negotiation merge into the written contract, when executed, which precludes parol evidence as to what the intention of the parties may have theretofore been when at variance with the terms of the written instrument.

2. Same—Timber—Lumber—Place of Delivery.

Parties entered into a written contract for the cutting of timber and manufacturing it into lumber, for which the plaintiff was to pay the defendant contractor a certain price when delivered and piled on yards to be provided by the defendant at a certain station without further specifications, which the defendant provided. The plaintiff was allowed to show that it was contemplated by the parties before and at the time

the writing was executed that he could acquire a certain tramroad for the purpose of delivering the lumber, and that the defendant had breached the contract by failing to provide yards for piling the lumber accessible or available therefor at the terminus of this tramroad, at the stated designation: *Held*, evidence of such contentions was of a variance, by parol, of the written instrument, and its admission was reversible error.

3. New Trials—Issues—Appeal and Error.

Where the prejudicial error committed by the Superior Court underlies or affects all the issues submitted to the jury, a new trial will be granted on all of them, and not confined to one or more of them in the discretion of the court.

CIVIL ACTION, tried before *Ray, J.*, and a jury, at April Term, 1919, of BUNCOMBE.

The action was brought to recover damages alleged to have resulted from a breach, on the part of the defendant, of a contract between the parties in regard to the cutting, logging, and manufacturing into lumber of certain standing timber on land in the county of McDowell, near Old Fort, being approximately 4 to 5 miles from that place. The contract was in writing, and its execution was admitted at the trial of the cause. The portions of the contract material to the controversy are:

"1. The contractor shall cut into logs and saw into lumber and pile on sticks at the mill site, as directed by the company, all the merchantable timber standing, lying and being on the land above described according to the terms of this contract, and when dry to be delivered and piled on a sidetrack of the Southern Railway Company at Old Fort, said sidetrack and sufficient piling ground to be provided by the company: *Provided, however,* if the contractor desires, he shall have the right to haul lumber while green to the piling ground provided by the company on the sidetrack at Old Fort, and place same in hacks in said piling ground as specified, and if this is done, then said lumber shall be measured and the full contract price of $11.50 per thousand feet shall be paid on the 5th day of each month for all lumber so hauled and hacked during the preceding month. If, however, said lumber is hacked in the woods, then said lumber is to remain on sticks not less than four nor more than six months.

"2. The contractor shall cut and log merchantable timber and manufacture the same into lumber and pile on yards at the rate of an average of 12,500 feet of lumber, board measure, per day, for at least 20 days of each month, except the months of January and February of each year, during the continuance of this contract, with the privilege to the contractor to cut, saw and deliver not exceeding 20,000 feet of lumber per day, beginning 30 days from date of contract and ending when all the merchantable timber to be manufactured under this contract shall have been cut and removed from said land.

"3. In consideration of the services rendered by the contractor in cutting, logging, sawing and placing on sticks, and delivery at Old Fort, of the merchantable timber therein agreed to be sawed, the company shall pay the contractor the sum of $11.50 per thousand feet, board measure, for all lumber sawed and put on sticks and delivered, as aforesaid, $10 per thousand feet of the aforesaid amount to be paid when said lumber is placed on sticks on the yards at the mills: *Provided, however,* that the popular square shall only be piled and shall at once be hauled to the railroad at Old Fort, and placed in the sheds provided by George Chapman; the contractor to be paid in cash on or before the 5th day of each month for all lumber sawed during the preceding month according to the estimates. The final measurements of the lumber to be made by an inspector to be furnished by the company at Old Fort, and to be according to the rules laid down by the National Hardwood Association, and the contractor shall have the right to be present, if he so desires, at the time said measurements is made, or to have a representative present in his stead: *Provided, however,* if the contractor desires, he shall have the right to haul lumber while green to the piling ground provided by the company on the sidetrack at Old Fort, and place same in hacks on the piling ground as specified, and if this is done, then the lumber shall be measured and the full contract price of $11.50 per thousand feet shall be paid on the 5th day of each month for all lumber so hauled and hacked during the preceding month.

"4. The company shall pay to the contractor half of the amount necessary to secure right of way for removing logs and lumber. Said amount to be based on and determined by receipts presented to the company by the contractor, showing actual payments for said right of way.

"5. It is understood and agreed between the parties hereto that the contractor shall pay to the company $3 per thousand feet for all logs now cut and logged on yards, and 75 cents per thousand feet for all logs now cut and not on yards."

The plaintiff alleged a breach of the contract, in that:

1. The defendant failed to pay for the sawing and delivery of lumber, as it had agreed to do.

2. The defendant failed to pay for one-half the costs of rights of way.

3. The defendant failed to furnish sidetrack and piling ground at Old Fort, as it had agree to do.

The plaintiff further alleged that after the execution of the contract, and after he had begun his preparations for commencing the work, the defendant was not ready for him to begin work, and that he was damaged by reason of having to hold idle his mill and teams in Asheville.

The plaintiff further alleged that, at the request of the defendant, he had stopped the operation of his mill for two or three days, and that he was damaged thereby.

The defendant answered, denying the material allegations of the complaint, alleging full payment to the plaintiff of all sums due him under the contract, and by way of counterclaim alleging a breach of the contract by the plaintiff, and an overpayment of all sums due the plaintiff by the defendant, and prayed judgment on the counterclaim.

At the time of the execution of the contract between plaintiff and defendant there was a small tramroad running from Old Fort to a point about a half mile from the nearest timber. This tramroad, referred to in the testimony as a "dinky road," was at the time of the execution of the contract, owned and controlled by third parties, neither the plaintiff nor the defendant having any interest whatever therein. The plaintiff, however, after the execution and delivery of the contract, acquired this "dinky road" and undertook to utilize it in the delivery of the lumber mentioned in the contract. The defendant contended that, at the time of the purchase of the tramroad by the plaintiff, there was no piling ground or Southern Railway sidetrack adjacent thereto, but that it had furnished ample piling and sidetrack facilities at Old Fort, during the entire operations by the plaintiff, and some twelve months after the plaintiff commenced work, it did have piling ground and sidetrack facilities at a point adjacent to the terminus of plaintiff's tramroad, and that soon after the sidetracks last mentioned was placed, it was damaged by high waters, and the plaintiff repaired the same, or attempted thereafter to use it. The defendant further contended that some time thereafter the plaintiff stopped operations, leaving a large quantity of manufacturd lumber on sticks at his mill site, together with large quantities of logs cut and in the woods, and also a large portion of the standing timber, which was the subject-matter of the contract, uncut, and thereupon brought this suit for the alleged damage.

The plaintiff alleged that he stopped work because of the defendant's failure to perform its part of the contract.

There was a dispute as to the accuracy of these allegations, though it appears to be true that, at the time the contract was made, the plaintiff owned no interest in the tramroad.

The jury answered the issues as to claims and counterclaims in favor of the plaintiff.

The court admitted evidence and charged the jury that if the parties contemplated, at the time of making the contract, that the "dinky road" or tramroad, extending into the timber boundary, should be acquired by plaintiff and operated by him in connection with the sidetrack and piling ground at Old Fort, and that the latter should be accessible or convenient to the "dinky road," so that plaintiff could haul his lumber green instead of dry, and thereby save in the cost of hauling and price of the lumber, and the defendant did not comply with this understanding

of the parties, but failed to furnish such a siding and piling ground as contemplated, this would be a breach of the contract and entitle plaintiff to damages. Exception was taken to this and many other instructions and rulings.

Judgment was entered upon the verdict, and defendant appealed.

Craig, Erwin & Craig and Mark W. Brown for plaintiff.

Dorman Thompson, W. D. Turner, and Merrimon, Adams & Johnston for defendant.

WALKER, J., after stating the relevant facts as above: There are numerous exceptions stated in this case, but we will confine ourselves to only one of them, as we think that the court erred in its ruling and instruction covered by that exception. The contract is plainly and explicitly worded, and there is no doubt as to its meaning. The defendant was required to furnish a piling ground and sidetrack at Old Fort for stacking the lumber hauled by the plaintiff to that point and for convenience of transportation, but no particular place for the sidetrack and piling ground is specified, and nothing whatever is said in the contract about the tramroad. So far as appears from it, the plaintiff was to do the hauling of the lumber in his own way, and the defendant was in no way liable for his failure or inability to haul in any particular way or by any special mode of conveyance. If the plaintiff contemplated or intended, when he made the contract, to purchase the tramroad, so that he could haul his timber while it was green and thereby get more money for it, it is very sure that there is nothing in the contract which required the defendant to so locate the sidetrack or piling ground at Old Fort as to adjust them to this new method of hauling from the woods to Old Fort, or, in other words, so to place them as that they would be near the terminal of the tramroad or more accessible therefrom. There was nothing of the kind in the contract, and no liability arose out of a failure to do any such thing. To add such a stipulation to the writing, directly or indirectly, would be to vary it, and to make a contract for the parties which they have not made for themselves. If the plaintiff wished to impose a duty of that kind upon the defendant, he should have had it so stated in the contract. It was easy to do so, even if plaintiff had not then acquired ownership of the tramroad, or taken steps to do so. It will not do for one of the parties to allege that something was contemplated other than what we find in the writing itself, which is the final expression of their agreement. All things contemplated or intended by the parties, and all of their previous negotiations, are conclusively presumed, in law, to have been merged in the contract and to be expressed in the written memorial of it.

"Where a contract is wholly in writing, and the intention of the framers is, by law, to be collected from the document itself, then the entire construction of the contract—that is, the ascertainment of the intention of the parties as well as the effect of that intention, is a pure question of law, and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol the terms of the agreement are, of course, a matter of fact, and if these terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written instrument." *Young v. Jeffries,* 20 N. C., 357, op. by *Gaston, J.,* cited and approved in *Wilson v. Cotton Mills,* 140 N. C., 55; *Mining Co. v. Smelting Co.,* 122 N. C., 542, and in *Spragins v. White,* 108 N. C., 449, where the principle is fully discussed. It is not what was contemplated, or what may have been intended, but what they both agreed to do, as evidenced by the writing. *Justice Shepherd* said, in *Moffitt v. Maness,* 102 N. C., 457, 459: "There is, we fear, too great a tendency to relax the well settled rules of evidence against the admissibility of parol testimony, to contradict, vary, or add to the terms of a written contract, and it is thought that the courts, in their anxiety to avoid probable injustice in particular cases, are gradually construing away a principle which has always been considered one of the greatest barriers against fraud and perjury." This Court in that case quotes and approves the following from *Benwick v. Benwick,* 3 Harris (Pa.), 66: "Were the door opened still wider for the admission of all the loose dicta of the parties, running, it might be, as in this instance, through a long course of years, the flood of evil would become so great as to sweep before it every barrier of confidence and safety which human forethought, springing from experience, is so sedulous to raise against the treachery of memory and the falsehood of men. To avoid, therefore, what would really be a social calamity, it is recognized as a settled maxim that oral evidence of an agreement, entertained before its execution, shall not be heard to vary or materially affect it. . . . If any dicta, or even decisions in hostility to this axiom, are to be found, they must be ascribed to the strong desire we are all apt to be swayed by to defeat some strongly suspected fraud in the particular case. But these occasional aberrations but lead to the more emphatic reannunciation of a principle found to be essential to the maintenance of that certainty in human dealings, without which commerce must degenerate into chicanery, and trade become another name for trick." And speaking of the higher dignity and greater certainty of written evidence, *Chief Justice Taylor* said, in *Smith v. Williams,* 5 N. C., 426: "The writers

on the law of evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten, and, notwithstanding the splendid eloquence of Cicero to the contrary, in his declamation for the poet Archias, the sages of our law have said that the fallibility of human memory weakens the effect of that testimony, which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of facts, and leaves in the mind uncertain opinions, imperfect notions and vague surmises." It is of importance to bear in mind that in those cases, and in all of them, we believe, the attempt was to show orally, not as here, a mere contemplation or intention, but a distinct agreement, or stipulation, concerning a matter not expressed in the written contract. The language of the Court in *Knitting Mills v. Guaranty Co.*, 137 N. C., 565-569, is: "In this contention between the parties we are led to believe that the advantage is decidedly with the defendant. He is relying upon the last written memorial of the contract, which in law is taken to express all that the parties intended to put in it, and which merges in itself all prior or contemporaneous declarations or agreements. The legal effect of a final instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by proof of any preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an allegation of fraud or mistake or unless the terms of the instrument itself are ambiguous and require explanation," citing numerous cases.

The charge of the court in this case ignored the express terms of the contract, and directed the jury to consider, upon the questions of breach and damage, a matter entirely extraneous to it, which is not permissible under the well settled rule which we have stated, and the defendant was clearly prejudiced throughout by this error. It extends to the alleged breach of the contract by the defendant, and also to that of the plaintiff set up in its counterclaim. The plaintiff alleged that the defendant had broken its contract, and that he had abandoned the work because of this breach by the defendant; while the defendant alleged that plaintiff abandoned the work without just or legal cause or excuse, and the instruction touched both phases. The instruction was so vital, and so injurious to the defendant, that we would not, in any view, exercise our discretion by restricting the new trial to any one or more of the issues. *Nathan v. R. R.*, 118 N. C., 1066; *Hawk v. Lumber Co.*, 149 N. C., 10.

We therefore conclude that there was error, and the case should be submitted to another jury.

New trial.

BOARD OF COMMISSIONERS AND BOARD OF EDUCATION OF BUNCOMBE COUNTY v. C. N. MALONE.

(Filed 20 December, 1919.)

School District—Bonds—Statutes—Specified Purposes—"Equipment"—Surplusage—Implied Powers.

Where a statute authorizes a county to call an election upon the petition of a certain per cent of the voters of a school district therein for the issuance of bonds therefor, with provision for interest thereon and a fund for retiring the bonds at maturity, etc., and specifies the purposes therefor, for "repairing, altering, making additions to or erecting new buildings, or for purchasing schoolhouse sites or playgrounds," etc., and a petition from the required number of voters is presented adding to the specifications of the statute, the word "equipment" for new buildings, the commissioners order the election and publish notices thereof accordingly, but refer to the statute and it is stated in the petition, order for the election, and notices that it is in pursuance of the statute, designating it: *Held*, the addition of the word "equipment" is not a jurisdictional averment in its effect, and where the other requirements of the statute are followed, the bonds will not be declared not valid solely on that account; and, *semble*, the necessary equipment for the use of such buildings, fastened thereto, and fixtures therein, such as desks, etc., will not be regarded as a substantial departure from the purposes of the statute.

CIVIL ACTION, heard on case agreed, before *Finley, J.*, at December Term, 1919, of BUNCOMBE.

The action is to collect the purchase money bid by defendant for $40,000 of municipal bonds of Weaverville Public School District, and $50,000 of the Emma Special School Tax District of said county. Defendant having declined to pay on the ground that said bonds did not constitute valid obligations of said districts, etc.

There was judgment for plaintiffs, and defendant excepted and appealed.

J. D. Murphy for plaintiff.
C. A. Thomasson for defendant.

HOKE, J. Under ch. 722, Public-Local Laws 1915, the commissioners of Buncombe County are authorized to issue coupon bonds in behalf of any general or special school tax district of the county on approval of the majority of the qualified voters of the district "for the purpose of repairing, altering, making additions to, or erecting new buildings, or for purchasing schoolhouse sites or playgrounds," etc. The statute provides that the election to determine the question shall be ordered on petition of 25 per cent of the qualified voters of the district, and approved by the county board of education, and contains other regulations

as to the registration of voters, notices, and methods of conducting the election held pursuant to the act.

From the facts stated in the case agreed, it appears that, in reference to both the school districts, the question has been submitted and approved by a majority of the voters at an election held for the purpose; that the petition for the election was signed by 25 per cent of the voters, and was approved by the county board of education, and that all the formalities as to registration, notices, etc., have been observed; the single objection being that, in the petition for the election for the Weaverville district, the purpose stated is "for the erecting a new school building and *equipping* the same and the purchasing of school grounds." And for the Emma School District, the purpose stated is for "erecting a new building in said district and equipping the same," whereas the purpose stated in the act is "for repairing, altering, making additions to, or erecting new buildings, or for purchasing schoolhouse sites or playgrounds," and makes no mention of "equipment," the petition for the election in the Weaverville district being as follows:

"To the County Commissioners of Buncombe County:

We, the undersigned voters of Reems Creek Township, Buncombe County, residing in the Weaverville Public School District, in said county and township, respectfully petition your honorable board to order an election to ascertain the will of the people in said public school district whether forty thousand dollars ($40,000) in bonds shall be issued for the purpose of erecting a new school building and equipping said building, and the purchasing of school grounds in accordance with the provisions of an act passed and ratified by the General Assembly of North Carolina at the session of 1915.

(Signed) T. O. DEADERICK (and others)."

The petition for the Emma Special School Tax District being in similar terms except that in the latter the additional purpose of "purchasing school grounds" does not appear. The statute also contains provision for levying a tax on the taxable property and polls of a given district sufficient to pay the interest on the bonds and to create a sinking fund to pay the principle at maturity, and upon these facts pertinent to the inquiry we see no reason why the bonds should not constitute valid obligations of the district in question. As now advised, we incline to the opinion that where power is conferred on a municipal board in charge of the matter "to raise the means and erect a new building" for school purposes, it should be held to include the right to procure and pay for the ordinary equipment. As we understand it, such an expenditure would be chiefly for seats and desks for the pupils, usually fastened to the floor, after the manner of fixtures, and necessary to the proper use

and enjoyment of such a building, but even if this term equipment should be regarded a substantial departure from the purposes contemplated and provided for in the statute, as the petition, the order of election, and the notices concerning the same all expressly state that the election is to be held and building erected, etc., in accordance with the provisions of the act passed and ratified by the General Assembly of North Carolina at the session of 1915, "The notice referring to the act as chapter 722, Public-Local Laws of 1915," the provisions of the statute are controlling on the subject and the term equipment, even if unwarranted, should be rejected as surplusage or disregarded as being in violation of the law.

True, we have held that the preliminary petition, being the basis of such a proceeding, should comply with the essential requirements of the statute, among them, the provision as to the number of voters signing the same, and that requiring the approval of the county board of education, *Gill v. Comrs.*, 160 N. C., 176; *Key v. Board of Education,* 170 N. C., 123, but, on the facts of this record, the reference in the petition to equipment as one of the purposes does not come within the principle of these cases. Applying, as it does, only the distribution of the proceeds on which, as we have seen, the statute, made a part of the petition, affords the controlling rule, this addition of "equipment" should in no sense be construed as a jurisdictional averment or allowed in any way to affect the validity of the election or the bond issue to be made in pursuance of the same.

There is no error and the judgment for the plaintiff is

Affirmed.

WILLIAM BATTLE v. CLEAVE & ROGERS, RECEIVERS OF THE CHAMPION LUMBER COMPANY.

(Filed 20 December, 1919.)

1. Railroads—Derailment—Negligence—Evidence—Nonsuit—Trials.

Upon evidence tending to show that while plaintiff, an employee of the defendant railroad, was riding with the defendant's superintendent on a hand or push car, recently repaired in the defendant's shop, the two front wheels "dropped on the track"; which the superintendent explained as a certain lack of proper repair, and that the car should be sent back to the shop; that further along on a trestle the same thing again occurred, throwing plaintiff to his injury: *Held*, the derailment of the car was in itself evidence of negligence, and taken with the other testimony as to the defective repair of the car, a motion as of nonsuit was properly disallowed.

2. Evidence—Nonsuit—Trials.

Where the defendant, in an action to recover damages for a personal injury alleged to have been negligently inflicted, relies for defense upon the plaintiff's contributory negligence, and there is evidence that the defendant's negligence caused the injury alleged, the burden of showing this defense is on the defendant, and a motion as of nonsuit may never be allowed on such issue where the pertinent and controlling facts are in dispute, or where opposing inferences are permissible from plaintiff's proof, or where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense.

3. Same—Contributory Negligence—Instructions—Verdict Directing.

Upon evidence showing that the superintendent of defendant railroad company had just brought the defendant's hand car from the defendant's repair shop, and upon its being derailed while he and the plaintiff were riding thereon he stated "they had not adjusted the car properly, and it would have to go back to the shop"; that further on the car again became derailed in like manner, at a trestle, throwing the plaintiff some eight or ten feet to his injury, the superintendent remaining unhurt, and affording evidence of the defendant's actionable negligence: *Held*, the suggestion of the superintendent did not give import of such menace as to constitute contributory negligence on the part of the plaintiff in continuing to ride with him, and operate the car under the circumstances, and the charge to the jury in this case that there was no evidence thereof is sustained.

CIVIL ACTION, tried before *McElroy, J.*, and a jury, at May Term, 1919, of JACKSON.

The action is to recover damages for physical injuries caused by negligence of defendants in the equipment and operation of the railroad of defendant company.

There was denial of liability and plea of contributory negligence on part of plaintiff, and, on issues so raised, verdict for plaintiff. Judgment on verdict, and defendant excepted and appealed.

Sutton & Stillwell and Martin, Rollins & Wright for plaintiff.
Stevens & Anderson for defendants.

HOKE, J. The facts in evidence appearing from plaintiff's own testimony, the only witness examined, tend to show that in June, 1918, in the employment of defendants as log scaler, he was out at one of the camps, several miles from the plant or central station at Crestmont; that the superintendent of the logging force, a Mr. Heatherby, had come out to the camp over the company's road on a lever or push car, the car having just been repaired, and, when they were ready, the two put the car back on the track and started on their return to Crestmont. Soon after starting the two front wheels of the car "dropped from the track." Heatherby said, in explanation, that "they had tightened both front

wheels on the axle and one of them should be loose. The car then ran on without incident till they were going over a trestle near Crestmont, at 4 or 5 miles an hour, when it again left the track, throwing plaintiff to the ground, a fall of 8 to 10 feet, and the car fell on him, causing painful, serious, and protracted injuries. Heatherby, who was not hurt, lifted the car off plaintiff, and, in doing so, said: "They had not adjusted the car properly, and it would have to go back to the shop."

On this, the principle evidence relevant to the inquiry, the jury have established liability of defendants, and, on careful consideration, we find no reason for disturbing the results of the trial.

It is chiefly objected for defendants that the trial court should have allowed their motion to nonsuit, but the exception is without merit.

Under our decisions bearing on the question, the derailment of the car raises a presumption of negligence sufficient of itself to carry the case to the jury on the issue as to defendant's breach of duty. *Wallace v. Power Co.,* 176 N. C., 558; *Mumpower v. R. R.,* 174 N. C., 742; *Overcash v. R. R.,* 144 N. C., 577. And, in addition, there are the direct statements of the superintendent, made at the time of the occurrence, tending to show negligence in the recent repairs of the car made at the company shops.

It is earnestly insisted for defendant, however, that judgment of nonsuit should have been entered by reason of contributory negligence on the part of the plaintiff. Such a judgment has been given in rare instances on the grounds suggested, and where, from the proof offered in support of plaintiff's cause of action, it clearly appears that his own negligence has been the proximate cause of the injury or one of them. *Dunnevant v. R. R.,* 167 N. C., 232; *Mitchell v. R. R.,* 153 N. C., 116; *Strickland v. R. R.,* 150 N. C., 4.

The burden of showing contributory negligence, however, is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense. *Russel v. R. R.,* 118 N. C., 1098; *House v. R. R.,* 131 N. C., 103.

In the present instance, while the plaintiff's testimony shows that the two front wheels had run off the track as they started back to the plant, and the superintendent had said they had tightened both wheels when one should have been loose, it also shows that the car had just been repaired at the shops; that the superintendent had himself just brought it out from the plant without mishap; that it was put back on the track and was being operated under his immediate supervision, and, under all the facts and attendant circumstances, there was nothing to show that

the defect suggested by the superintendent gave import of such menace as to constitute contributory negligence in the further use of the car, and assuredly it did not follow as a conclusion of law from plaintiff's proof.

It is further objected that his Honor charged the jury "that there was no evidence of contributory negligence on the part of plaintiff as alleged in the answer." The only contributory negligence stated and relied upon in the answer is that plaintiff was negligent in operating the car, and in the way he endeavored to jump off same when it became derailed at the trestle, and a perusal of the facts in evidence shows that the charge of his Honor is fully justified and sustained.

We find no reversible error in the record, and the judgment for plaintiff is

Affirmed.

DILLARD L. LOVE ET AL. v. ARTHUR LOVE ET AL.

(Filed 20 December, 1919.)

Wills—Devise—Estates—Remainder—Defeasible Fee—Parent and Child—Adoption—Legitimation—Statutes.

Where there is a limitation over by devise upon contingency that the ulterior remainderman die leaving "heirs lawfully begotten," such remainderman takes a defeasible fee, the intent of the testator being that the fee simple depend upon his having children born in lawful wedlock, which may not be defeated by his having had only an illegitimate son, legitimated by proceedings under Rev., 263, 264, or adopted under sec. 177.

APPEAL by plaintiffs from *McElroy, J.*, at chambers, Sylva, N. C., 24 May, 1919, from JACKSON.

This is an action for the recovery of land, for an injunction to the final hearing to prevent cutting and removing timber, and also for a receiver.

There was a temporary restraining order, which the court refused to continue to the hearing, and the plaintiffs appealed.

Coleman C. Cowan, J. S. Manning, and S. Brown Shepherd for plaintiffs.

Felix E. Alley and James H. Merrimon for defendants.

CLARK, C. J. The determination of this appeal depends upon the construction of item first of the will of John B. Love, who died in February, 1873, leaving him surviving his widow, 6 children, and a few grandchildren, the children of daughters who had died before the making

of the will. By said item first of the will he devised to his wife the land in controversy in this action: "To have and to hold to her during her natural life, and at her death to my youngest son, Calhoun Love, and his heirs lawfully begotten in fee simple forever, but in case my said son shall die without issue, the said lands mentioned above are to revert back and be equally divided between his brothers and their heirs forever."

The widow died in April, 1893, and on her death Calhoun Love entered into and upon the lands in controversy and occupied them until his death in February, 1919, when the defendant, Arthur Love, who was living with him, continued to live thereon, claiming them as his own.

Calhoun Love was never married, and the plaintiffs are his brothers and their heirs. They demanded of Arthur Love possession of the premises, and on his refusal began this action. It is alleged in the complaint and admitted in the answer that Calhoun Love died in February, 1919, without ever having married, and without leaving issue begotten in lawful wedlock; that the defendant Love, alias Arthur Browning, was the child of Niece Browning, an unmarried woman, who was born in 1894, and that in October, 1908, the said Calhoun Love, upon proper proceedings in the Superior Court of Jackson, filed a petition under Rev., 263, that said Arthur Browning be legitimated and the decree was so entered in said court. The sole question presented is as to the effect of the provisions of Rev., 177, and 263.

The plain intent and language of those sections is that a child so adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father "in the same manner as if it had been born in lawful wedlock."

But under the will of John B. Love, Calhoun Love had only a fee defeasible in the land in question. Under the terms of the will, Calhoun Love having left no heirs lawfully begotten, his estate terminated and passed to his brothers and their heirs, the plaintiffs in this action.

The act of legitimation and the decree of the court thereon entitled Arthur Love to inherit the realty, and to receive the personalty, of Calhoun Love, which he owned absolutely, but it could not have the effect of rendering indefeasible the title to the realty in question which by the terms of the will was made defeasible upon the death of Calhoun Love without heirs "lawfully begotten."

The amount involved is considerable, and counsel have filed very able and elaborate briefs. But an examination of the authorities cannot shake the proposition that the intention of the testator should govern; that the lands here devised to Calhoun Love after the death of his mother were possessed by him in fee defeasible upon his dying without lawful issue; and that the decree of legitimacy did not make Arthur Browning, alias Arthur Love, his lawfully begotten issue.

Rev., 264, defines the effect of the decree made under the Rev., 263, as follows: "The effect of such legitimation shall extend *no further* than to impose on the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only *his* real estate, and also to entitle the child to the personal estate of the father in the same manner as if he had been born in lawful wedlock." Rev., 264.

This statute seems to be clear enough on its face. It limits the right to inherit to the properties of the adopting father, and so clearly that it would seem unnecessary to cite authorities; but if authorities are necessary, it will appear that this Court has construed this and other statutes on all-fours to the effect that the legitimated child can only inherit from the adopting father, and cannot inherit from the father's ancestors or other kindred, or be representative of them. Such adopted child cannot be issue or heir general. The word "only" as used in this statute qualifies the words "inherit from the father," and not the words "real estate," thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father.

That the devise to Calhoun Love was defeasible upon his dying without heirs "lawfully begotten" was settled by this Court in *Whitfield v. Garris,* 131 N. C., 148, and on rehearing, 134 N. C., 24, after an exhaustive review of the authorities, it was reaffirmed. In that case it was held that "Where a testator devised realty to a grandson, and in the event of death of the latter without children, then the land to descend to other grandchildren, such devise vested a fee-simple estate in the first devisee defeasible only on condition that he die without leaving heirs of his body."

The principle there laid down has been approved and applied in *Wilkinson v. Boyd,* 136 N. C., 46; *Sessoms v. Sessoms,* 144 N. C., 121; *Elkins v. Seigler,* 154 N. C., 374; *Dunn v. Hines,* 164 N. C., 113; *Rees v. Williams, ibid.,* 128; *S. c.,* 165 N. C., 201; *Burden v. Lipsitz,* 166 N. C., 523; *Hobgood v. Hobgood,* 169 N. C., 485; *Albright v. Albright,* 172 N. C., 351; *Bizzell v. Building Asso., ibid.,* 158; *Kirkman v. Smith,* 174 N. C., 603; *S. c.,* 175 N. C., 579; *Williams v. Biggs,* 176 N. C., 48. See, also, Rev., 1581; 2 Bl. Com., 172; 4 Kent Com., 268.

A legitimated or adopted child under this decree and statute is not "issue" within the sense that the same is used in the last will of John B. Love. By legitimation, the adopted child is not made the kin of the kindred of the adopting father. In blood and status as to lineal and collateral relatives it is still alien. The effect is simply to create a personal status between the petitioning father and the child legitimated,

such that the adopted child may inherit from the adopting father those properties which he might voluntarily during his lifetime give to the illegitimate child in fee simple. The legitimation proceedings does not make the child adopted an heir general such as that he will take an estate by limitation, as heir of heirs, from generation to generation, therefore the foregoing decree legitimating Arthur Browning to Calhoun Love does not make the said Arthur Love "issue" within the meaning of the will of John B. Love. *Edwards v. Yearby,* 168 N. C., 663; *Bettis v. Avery,* 140 N. C., 185; *Jones v. Hoggard,* 108 N. C., 178; *Tucker v. Tucker, ibid.,* 235; *Howell v. Knight,* 100 N. C., 254; *Tucker v. Bellamy,* 98 N. C., 31; *King v. Davis,* 91 N. C., 142; *Doggett v. Moseley,* 52 N. C., 587; *Lee v. Shankle,* 51 N. C., 313; *Kirkpatrick v. Rogers,* 41 N. C., 130 (135); *Perry v. Newsom,* 36 N. C., 28; *Thompson v. McDonald,* 22 N. C., 463; *Drake v. Drake,* 15 N. C., 110; *Jones v. Jones,* 234 U. S., 618.

There are numerous decisions in other States to the same effect, and the very few to the contrary are in States where the statute for legitimation or adoption is different from ours.

The plaintiffs are entitled to recover the property, and the judgment below must be

Reversed.

LEW HOWARD v. ANDREWS MANUFACTURING COMPANY, INC.

(Filed 20 December, 1919.)

1. Railroads— Excavations— Negligence— Cattle— Grazing — Rights of Way.

Where the roadbed of a railroad company runs through the farm lands of the owner of the fee, the company must use efforts to protect the cattle of the owner, who has the right to graze his cattle upon his own land and upon the right of way not used for railroad purposes, and the company is liable in damages for the killing of a mare belonging to the wife of the owner of the fee, by reason of the caving in of an embankment to a cut caused by its having been left in a negligent condition.

2. Same—Damages—Evidence—Proximate Cause.

It is evidence that the cut of a railroad company has been left in an actionable negligent condition, when it tends to show that originally the embankment had the proper outward slope, but thereafter, in making a fill in another place, the company excavated the sides of the embankment so as to cause the top to overhang; and evidence that the wife of the owner of the fee had a horse which she grazed on her husband's lands, and one morning it was found injured and dead where the overhanging bank had caved in during the night, with hoof tracks above at the edge of the caved-in embankment, and on the dirt below, where the horse was found,

a packed place as if something had fallen on it, etc., it is sufficient for the jury to find that the killing of the horse was caused by the defendant's negligence, and as a result which might reasonable have been anticipated.

3. Appeal and Error—Witness Tendered—Cross-examination—Record—Purpose—Result.

The question as to whether a party has the right to cross-examine a witness who was only tendered, as a witness for the party tendering him will not be considered on appeal, when the purpose of the examination and the expected result is not made to appear.

APPEAL by defendant from *Webb, J.*, at the June Special Term, 1919, of CHEROKEE.

This is an action for damages for the alleged negligent killing of a mare owned by the plaintiff. The negligence alleged as a ground for the action was that the defendant so negligently constructed, kept, and maintained its line of railway that at a point where same passed through and over the lands owned by D. F. Howard, husband of the plaintiff, the line of railway passed through a cut so negligently constructed and maintained that for a space of about fifteen feet the bank of said cut projected over the roadbed for a distance of eighteen inches, and the ground and earth underneath said cut was hollowed out and the top of the cut left in an insecure and unstable condition; that the distance from the top of the cut to the roadbed underneath was ten feet, whereas, had said cut been skillfully constructed, there should have been a slope from the top of the cut to the roadway underneath. That on 1 June, 1917, the plaintiff's mare was turned out to graze upon the land of the husband of the said *feme plaintiff*, and while grazing on the land above the cut the bank caved in and gave way, throwing the mare upon the track below, and that she received injuries from which she later died, and that the mare was worth the sum of two hundred dollars.

The defendant denied all allegations of negligence, and also denied that the mare was killed by falling down the embankment.

The evidence of the plaintiff tends to prove that the defendant had constructed a line of railway through the lands of D. F. Howard, husband of the plaintiff; that the defendant, in building its railway through these lands, had made a cut about ten or twelve feet deep, and as first constructed, the cut sloped outwards to the top, but dirt had been removed in making a fill so that the top of the cut overhung the roadway underneath about eighteen inches, and the cut was hollowed out underneath the overhanging bank. That on 1 June, 1917, the plaintiff's mare had been turned out to graze upon a portion of the lands of the husband lying between the graveyard and the railway; the mare was in good condition the evening before. The next morning she was found right by the railway track, on the roadbed, underneath the cut. She was

hurt; her hip was broken, and she was in a droopy condition. The mare died the following night, and was worth two hundred dollars. Tracks showed where a horse had come down to the top of the bank above where the mare was found; the top had caved in, and showed the print of two feet of a horse where it was broken through, and there was a place underneath the bank where the dirt on the roadway was packed as if something had fallen on it. The tracks of a horse appeared on the ground above the cut (where the horse was grazing), leading to the cut, the overhanging dirt had caved in, and showed a horse's track where it had fallen in, and the horse was found on the ground underneath this broken place, where a witness, the plaintiff, testified: "I just saw where her feet had cut through the bank that was hanging over, and then we saw her print on the ground where she hit the soft ground." It was also in evidence that railway cuts, as usually constructed, sloped outward from the roadbed.

"Frank Wilhide, a witness for the plaintiff, was tendered but not examined by the plaintiff, and after he was called and sworn, defendant's counsel stated that he wanted to cross-examine him and not use the witness as a witness for the defendant. The court ruled that the witness, after he was tendered, was a witness for the defendant, and to this defendant excepted and declined to examine the witness as a witness for defendant, but insisted that he had the right to cross-examine him."

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was overruled, and defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

Witherspoon & Witherspoon for plaintiff.
M. W. Bell for defendant.

ALLEN, J. The right of way of the defendant is not clearly defined, but, whether extending on both sides of the track beyond the sides of the cut or not, the plaintiffs had the right, as owners, to use any part thereof not required or used for railroad purposes (*R. R. v. Bunting,* 168 N. C., 580), and it was not contributory negligence for the plaintiffs to permit their horse to run at large in the pasture through which the defendant's road passed. *Winkler v. R. R.,* 126 N. C., 373.

It was also the duty of the defendant to use all reasonable efforts to protect the property of the plaintiffs, and it is liable in damages for its failure to do so. *Willis v. White,* 150 N. C., 202.

Applying these principles, we are of opinion there was evidence fit to be submitted to the jury, and that the motion for nonsuit was properly overruled.

The evidence tends to prove that the banks of the cut were properly constructed at first, sloping from the bottom out from the track; that, needing soil for a fill, the defendant dug out the sides of the banks without disturbing the top, thus leaving the upper part with slight support; that this was done through the pastures of the plaintiffs, where it might be reasonably anticipated stock would graze and approach the cut, and this is evidence of negligence.

The circumstances also show the mare was injured by falling in the cut, as a result of this negligence.

Tracks of the horse on the top of the bank near where it caved, the top caved, two tracks of a horse where the bank broke through, the soil on the roadbed underneath the bank packed as if something had fallen on it, the mare in good condition the evening before, and found the next morning on the roadbed underneath the cut near where the bank caved with her hip broken, are circumstances which lead to but one conclusion, and this is that the mare, while grazing, approached too near the overhanging bank, fell through, and was injured.

The exception to the refusal to permit the defendant to cross-examine the witness tendered, and treat him as a witness for the plaintiffs, cannot be considered, because neither the purpose of the examination nor the anticipated result is shown, and if a new trial should be ordered on this ground it might then appear that the witness knew nothing that would even remotely affect the controversy.

No error.

WILLIAM L. SHEPHERD, JR., ET AL. v. THOMAS B. SHEPHERD.

(Filed 20 December, 1919.)

1. Pleadings—Defense Bond—Answer Stricken Out—Notice to Show Cause—Judgments—Procedure.

The procedure to strike out an answer and for judgment for the want of a defense bond, is upon a rule to show cause, and then if it is adjudged that such bond is required, the defendant should be given time for that purpose; and where the pleadings have been filed and no such bond had been given, and by agreement of the parties the case has been continued from one term of court to another, it is reversible error for the trial judge, during the latter part of the subsequent term, to enter judgment of the kind indicated without having followed the procedure stated.

2. Same—Courts—Discretion—Waiver—Appeal and Error.

Striking out an answer by the court for the want of a defense bond and rendering judgment against the defendant is not a discretionary matter

with the Superior Court judge, where the defendant has been led to believe that the plaintiff has waived the bond, and such action is reviewable on appeal.

MOTION in the cause heard by *Ray, J.,* at August Term, 1919, of MACON.

The plaintiff moved to strike out the answer of the defendant for want of a defense bond. The motion was allowed, and judgment final for want of answer was rendered. Defendant appealed.

Felix E. Alley and Jones & Jones for plaintiffs.
J. Frank Ray for defendant.

BROWN, J. The case on appeal states that summons was issued 31 July, 1918, returnable to August term of said court, and duly served on defendants 8 August, 1918. At November Term, 1918, neither party asked that the case be placed for trial on the calendar at said term. Before the April Term of court, 1919, was to begin the case was again continued by consent, and not placed on the calendar. No court was held at said term on account of the sickness of Judge McElroy's family.

At August Term, 1919, the case was again by consent continued to November Term, 1919, and not placed on the trial calendar. On the last day of said August Term, 1919, upon motion of plaintiffs, no notice having been served on the defendants, judgment was entered for the plaintiffs as appears in the record for want of a defense bond. The complaint was filed 13 August, 1918. The answer was filed 13 August, 1918. Under the circumstances of this case, it was error in the court to strike out the answer of the defendant without notice because no defense bond had been filed.

The defendant was entitled to a rule to show cause, and then if the court adjudged that a defense bond was required, the defendants were entitled to time within which to file the same. It appears in the case on appeal that the cause was continued at August Term, 1919, by consent until the next term, and that this motion was made and granted on the last day of August term. The point is expressly decided in *Cooper v. Warlick,* 109 N. C., 672, where the cases were cited. This is not a matter within the discretion of the judge. An order of the Superior Court striking out an answer for want of a bond is reviewable where the defendant has been lead to believe that the plaintiff has waived the bond. *McMillan v. Baker,* 85 N. C., 291, and cases cited in the opinion.

In the case at bar the answer was filed at the same term with the complaint. No motion was made for an entire year, and then only

when the case had been continued for the term, and on the last day of that term.

Judgment is set aside and the Superior Court is directed to allow the defendant to file the defense bond within a reasonable time.

Reversed.

DEE BECK v. SYLVA TANNING COMPANY.

(Filed 20 December, 1919.)

1. **Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Fellow-servant.**

The duty of the employer to furnish his employee a safe place for the performance of his services cannot be delegated, and where the negligence of the employer in this respect concurs with that of his other employees in proximately causing a personal injury to the plaintiff, the employer may not escape liability on the ground that it was caused by the negligence of the plaintiff's fellow-servants.

2. **Same—Contributory Negligence—Assumption of Risks—Questions for Jury—Trials.**

In this action to recover damages for an alleged negligent injury in the failure of a tannery to provide sufficient lights for the plaintiff, working at night with other employees, filling tubs of boiling water with chipped wood, into one of which, left uncovered, the plaintiff fell to his injury, there was allegation and evidence as to the defendant's failing to furnish sufficient lights and allowing chipped wood to accumulate in the walkway between the tubs: *Held*, sufficient to be submitted to the jury upon the question of defendant's actionable negligence, and that of the plaintiff's contributory negligence or assumption of risks was also properly submitted to them under a charge free from error. *Hicks v. Mfg. Co.*, 130 N. C., 319, and other like cases cited and applied.

3. **Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Subsequent Repair—Corroborative Evidence.**

Where there is evidence tending to show that an employer has negligently failed to furnish his employee a safe place to work by reason of a certain defect, it is competent to show, by way of corroboration, in certain instances, where the defect is denied, that the place had subsequently been repaired by the employer. *Muse v. Motor Co.*, 175 N. C., 469, cited and applied.

4. **Appeal and Error—Objections and Exceptions—Evidence—Exceptions—Requests for Instructions.**

A general exception to the admissibility of evidence, competent in part, will not be considered on appeal, unless it is properly asked to be restricted to the purpose for which it was competent, or in the absence of special requested instructions in regard to it.

5. Instructions—Special Requests.

Where the charge of the judge, construed as a whole, is substantially correct, any special feature of the case omitted by him should be covered by requests for special instructions thereon.

6. Instructions—Special Requests—Evidence—Abstract Principles.

Prayers for special instructions should not be mere abstract propositions of law, which are not applicable to the evidence, nor should they be based upon a partial statement of the evidence, omitting therefrom that which is material and relevant to the issues, and vitally essential to a proper consideration of the case by the jury.

7. Instructions—Opinion of Judge.

Held, in this case, the instruction of the court was not objectionable as expressing an opinion inhibited by the statute. *Davis v. Blevins*, 125 N. C., 433.

CIVIL ACTION, tried before *McElroy, J.*, and a jury, at May Term, 1919, of JACKSON.

The plaintiff brought this action against the defendant to recover for a personal injury, alleged to have been sustained while in the employ of the defendant company. He alleged that the defendant was negligent in its duties to him in the following respects: that it failed to furnish him a reasonably safe place to work, and safe tools and appliances with which to work, and failed to give him proper instructions; that the plaintiff was working on the night shift and defendant failed to furnish sufficient lights and allowed chipped wood to accumulate in the walkway between the tubs, which plaintiff was filling with chipped wood, and that the defendant failed to keep the lid on the tub, in which boiling fluids had been poured over the chipped wood with the view of extracting the acids therefrom. Plaintiff alleged that he was injured because the lid was left off the tub, and because chips had accumulated in the walkway, and that it was dark where his work required him to be, because broken lights had not been replaced. He further alleged that he stumbled over the chips accumulated on the walkway, because of the darkness, and fell into the tub, as a result of which his feet and legs were burned, for which alleged injury he claimed that he was damaged in the sum of $3,000.

The defendant answered, denying all the allegations of negligence alleged against it, and denying that the plaintiff was injured because of any act of negligence on its part. The defendant averred that the plaintiff contributed proximately to his own injury; that it was the duty of the plaintiff, and those who worked with him as fellow-servants, to put the chipped wood in the tubs, to level the tub when filled, and to put the lid on the tubs, to clean up the walkway, and if a light bulb was broken, to put in a new one, and that plaintiff failed to exercise due and

reasonable care for his own safety; that plaintiff knew all the conditions and dangers incident to the performance of his work, and assumed the risk; that if there was any negligence other than plaintiff's, it was that of his fellow-servants, in the selection of whom the defendant had exercised due care.

Verdict and judgment for plaintiff, and defendant appealed.

Sutton & Stillwell for plaintiff.
Coleman C. Cowan for defendant.

WALKER, J., after stating the relevant facts as above: There was evidence that the approaches to the tub in which the chipped wood was placed for boiling in order to extract the acid therefrom, were not kept open and in a reasonably safe condition, so that defendant's employees could use the same with security to themselves, and that plaintiff, while engaged in his proper work, stumbled over the obstructions in one of these walkways, or aisles, between the rows of tubs, and fell into one of the tubs, the aperture in which should have been closed with the cap, or lid, made to cover it. He received injuries of a serious nature, and now asks for damages to compensate him for them, as he alleges they were caused by the defendant's negligence in not exercising that degree of care which the law requires to make the place reasonably safe for him to work therein, and in not keeping and maintaining it in that condition.

It is unquestionably the duty of the master to use proper care in providing a reasonably safe place where the servant may do his work, and reasonably safe machinery, implements, and so forth, with which to do the work assigned to him (*West v. Tanning Co.*, 154 N. C., 44), and this duty is a primary, and an absolute one, which he cannot delegate to another without, at the same time, incurring the risk of himself becoming liable for the neglect of his agent, so entrusted with the performance of this duty which belongs to the master, for in such a case, the negligence of the agent, or fellow-servant, if he is appointed to act for the master, is the latter's neglect also. *Hicks v. Mfg. Co.*, 138 N. C., 319; *Harman v. Contracting Co.*, 159 N. C., 22; *Alley v. Charlotte Pipe Co.*, 159 N. C., 327; *Pigford v. R. R.*, 169 N. C., 94; *Mincey v. R. R.*, 161 N. C., 468; *Steele v. Grant*, 166 N. C., 635; *Taylor v. Power Co.*, 174 N. C., 583. If the negligence of the master concurs with that of the servant in causing an injury, the master is liable. *Tanner v. Lumber Co.*, 140 N. C., 475; *Wood v. Contracting Co.*, 149 N. C., 177; *Ammons v. Mfg. Co.*, 165 N. C., 449. We said in *Steele v. Grant, supra:* "Where the master has negligently failed in his duty to supply the servant with safe appliances and place for the work required of him, and this negligence concurs with that of a fellow-servant in proximately causing

the injury to the servant, the master's responsibility is the same as if his negligence was the only cause thereof."

The fault, therefore, with the defendant's prayers for instructions, so far as they related to the negligence of a fellow-servant, is that they omit the necessary qualification as to the liability of the master, when his negligence concurs with that of the servant in the performance of his primary duty, and bases the defendant's right to a verdict solely on the negligence of a fellow-servant. *Pigford v. R. R., supra.* This question received full consideration in *Steele v. Grant, supra,* where we said: "It being the duty of the master to provide a reasonably safe place in which to do the particular work assigned to his servant, he cannot interpose as a defense to an action for an injury to the employee the neglect of another servant to perform that duty for him; nor, where the negligence charged against him is the failure to supply a reasonably safe place to work, the master cannot escape liability upon the ground that a particular act of negligence was that of a fellow-servant. The negligence of the latter must be unmixed with his own in order that his plea can be available to him, provided the negligence of the two united and constituted the proximate cause of the injury. These principles are fully sustained in the following cases," citing *B. and O. R. Co. v. Baugh,* 149 U. S., 368; *Hough v. Railroad Co.,* 100 U. S., 213; *N. P. R. Co. v. Snyder,* 152 U. S., 68; and *N. P. Railroad Co. v. Herbert,* 116 U. S., 642, where the subject is exhaustively discussed. See, also, *Barkley v. Waste Co.,* 147 N. C., 585 (*S. c.*, 149 N. C., 287); *Tanner v. Lumber Co., supra; Avery v. Lumber Co.,* 146 N. C., 592; *Moore v. R. R.,* 141 N. C., 111.

The charge of the court as to assumption of risk and contributory negligence was plainly correct, and in strict accordance with the precedents. *Hicks v. Mfg. Co.,* 130 N. C., 319; *Pressly v. Yarn Mills, ibid.,* 410; *Pigford v. R. R., supra.* There was strong evidence of negligence, and we can see very little, if any, of assumption of risk or contributory negligence, but the charge gave the defendant the full benefit of both pleas, and we do not see how the judge could have gone further than he did in favor of these defenses without transgressing the well settled principles as declared by this Court in regard to them.

The testimony regarding subsequent repairs was admissible in corroboration of the evidence of the plaintiff and his witnesses, that the defect in the slide door existed, which was denied by the defendant. The evidence comes clearly within the exception to the general rule of law excluding it for the purpose of showing negligence on the part of the defendant. *Tise v. Thomasville,* 151 N. C., 283; *Pearson v. Clay Co.,* 162 N. C., 224 (225); *Boggs v. Mining Co.,* 162 N. C., 394; *West v. R. R.,* 174 N. C., 130; *Muse v. Motor Co.,* 175 N. C., 469; 25 Cyc.,

616-18. The defendant, as appears in the record, entered a general exception to the admission of this testimony on the trial, and did not ask that the same be restricted to the purpose for which it was competent, and requested no special instruction in regard to it. Its admission, therefore, is not assignable as error. Rule 27, Supreme Court; *Hill v. Bean,* 150 N. C., 436; *Tise v. Thomasville, supra.*

The charge, taken and considered as a whole, is at least substantially correct, and if defendant wished any special feature to be presented to the jury, it should have requested the court to give proper instructions to that effect. *Simmons v. Davenport,* 140 N. C., 407; *Marable v. R. R.,* 142 N. C., 61; *S. v. Turner,* 143 N. C., 641. The prayers should not be mere abstract propositions of law, which are not applicable to the facts, nor based upon a partial statement of the evidence, omitting therefrom that which is material and relevant to the issues, and vitally essential to a proper consideration of the case by the jury. An instruction, in response to such a prayer, would mislead rather than guide them to a correct verdict. *Harmon v. Construction Co.,* 159 N. C., 23, 29. The judge appears to have covered the case fully by correct instructions as to the law, in a fair and impartial charge, and to have given the prayers of defendant, when proper, with substantial accuracy. He was not obliged to use the very language of counsel.

The questions addressed by the court to witnesses were within the privilege of the court, and not improper. There was no expression or intimation of opinion, nor, so far as appears, were they asked in a tone or with such emphasis as would indicate any opinion held by the judge. *S. v. Lee,* 80 N. C., 483; *Davis v. Blevins,* 125 N. C., 433.

There was no error in any of the respects assigned by the appellant. No error.

CHEROKEE COUNTY v. J. R. McCLELLAND.

(Filed 20 December, 1919.)

1. Taxation— Realty— Sales— Liens— Judgments— Levy—Personalty— Claim and Delivery—Statutes.

Taxes duly assessed on real property are declared by statute a lien thereon from a given date enforcible by action as well as by levy and sale, and the tax list, in the collector's hands, with the fiat of the register as clerk of the board of commissioners endorsed thereon, are declared by statute to have the force and effect of a judgment and execution. *Wilmington v. Moore,* 170 N. C., 52, as to actual levy upon personal property required before claim and delivery, cited and distinguished.

2. Taxation— Realty— Sales— Actions— Mortgages—Municipal Corporations—Counties—Purchasers—Penalties—Statutes.

The lien on realty given for taxes and assessments due thereon is enforcible by action in the nature of an action to foreclose a mortgage, in which judgment may be entered for its enforcement, "together with interest penalties and costs allowed by law and costs of action," the action to be prosecuted in the name of the county when the lien is in favor of the State and county, Rev., 2868; and the holder of the certificate of purchase at a tax sale may institute such action to enforce collection of the amount due on giving the owner or occupant of the land ten days written notice of his purpose to bring the suit, his inability to find such owner or occupant excusing the failure to give such notice, and every county or other municipality is given the right, and it is made its duty, to prosecute said suits, and whether by private individuals or by the county or by other municipal corporations, the plaintiff shall, except in cases otherwise provided by law, recover interest at the rate of 20 per cent on all amounts paid out by him, or those under whom he claims, as evidenced by certificates of tax sales, deeds thereunder, or tax receipts, etc.

3. Same—Notice.

Where the lands of the owner have been regularly listed for taxation, sold for the nonpayment thereof after public notice given, of which the owner was fully aware, and bought in by the county at the tax sale, regularly had, and the ten days statutory notice had been served on him of the purchaser's purpose to bring the present suit, the defendant is held to the payment of the 20 per cent allowed by statute, and he may not successfully resist judgment therefor on the ground that the notice of the sale had not been given him as required by Rev., 2889, by tendering the amount of the taxes levied, and six per cent interest thereon. Rev., 2866, 2912.

4. Same—Available Personalty.

The enforcement of the lien on realty given by our statutes by action, etc., by a municipality or county that has purchased at the sale, may not be avoided on the ground that the owner had personal property available from which the taxes on the realty should first have been collected.

BROWN, J., dissenting.

CIVIL ACTION, tried before *Webb, J.*, at June Term, 1919, of CHEROKEE, a jury trial having been formally waived by the parties.

The action is by Cherokee County, and as holder of certificate of purchase at a tax sale of certain lands of defendant, to collect the taxes due thereon by foreclosure and sale, pursuant to the statute, the precise question presented being the right of plaintiff to collect the 20 per cent allowed by the statute in such suits, and the facts chiefly pertinent are set forth in his Honor's judgment as follows:

"This cause coming on to be heard, the parties waived a jury trial, and consented that the judge find the facts.

"From the evidence introduced, which was uncontradicted, and from the admission in the pleadings, the court finds the following facts:

"1. That the lands described in the complaint were duly listed in the name of the defendant for his State and county taxes for the year 1914, and the State and county taxes for said year were duly assessed and levied against the defendant for said year in the sum of $178.46.

"2. The defendant defaulted in the payment of said taxes, and the same have not yet been paid.

"3. The said lands were advertised for sale for said taxes by the sheriff and tax collector of Cherokee County, as required by section 2890 of the Revisal of 1905, and were sold by him on May 3, 1915, and were bid off by Cherokee County for the sum of $180.16, and he issued to Cherokee County a tax sales certificate for said sale, dated May 3, 1915.

"4. The defendant, during the time of said advertisement, lived in the town of Murphy, the county-seat of Cherokee County, and the sheriff of Cherokee County did not serve upon him the notice of said sale, neither by personal service nor by mailing notice to him, as required by section 2889 of the Revisal of 1905.

"5. That during the time of said advertisement the defendant saw his said lands advertised by the sheriff in the *Cherokee Scout,* the newspaper in which the sheriff and tax collector advertised said sale; and therefore had actual notice thereof, as given in said paper.

"5½. That for the year 1914 the defendant listed personal property for taxes in the sum of $235.

"6. That the lands described in the complaint were duly listed in the name of the defendant for his State and county taxes for the year 1915, and the State and county taxes for said year were duly levied and assessed against the defendant in the sum of $177.58.

"7. That the defendant defaulted in the payment of said taxes, and the same have not yet been paid.

"8. That said lands were advertised for sale for said taxes by the sheriff and tax collector of Cherokee County as required by section 2890 of the Revisal of 1905, and were sold by him on May 1, 1916, and were bid off by Cherokee County for the sum of $178.78, and said sheriff and tax collector issued to Cherokee County a tax sales certificate for said sale, dated May 1, 1916.

"9. That the defendant during the time of said advertisement lived in the town of Murphy, the county-seat of Cherokee County, and the sheriff and tax collector did not serve upon him the notice of said sale, neither by personal service nor by mailing notice to him, as required by section 2889 of the Revisal of 1905.

"10. That during the time of said advertisement the defendant saw his lands advertised in the *Cherokee Scout,* the newspaper in which the

sheriff and tax collector advertised said sale, and therefore had actual notice thereof, as given in said paper.

"11. That for the year 1915 the defendant listed personal property for taxation in the sum of $235.

"The defendant in open court offered to pay the aforesaid taxes, with interest thereon at 6 per cent, and the costs of this action.

"Upon the foregoing findings of facts it is the opinion of the court that the sheriff having failed to serve personal notice of the sales upon the defendant, the sales were invalid, and plaintiff is not entitled to 20 per cent interest.

"Wherefore, it is adjudged that the plaintiff do have and recover of the defendant the sum of $358.94, with interest at 6 per cent on $178.78 from May 1, 1916, until paid, and with interest at 6 per cent on $180.16 from May 3, 1915, until paid, and for the costs of this action, to be taxed by the clerk.

JAMES L. WEBB,
Judge Presiding."

It is admitted also in the pleadings that the ten days notice required before institution of the present suit (Rev., 2912) had been given. Plaintiff excepts to the refusal of his Honor to award 20 per cent on amounts due the county, etc., by reason of the purchase.

Dillard & Hill for plaintiff.
R. L. Phillips and J. D. Mallonee for defendant.

HOKE, J. The laws of this State make comprehensive provision for the collection of the public revenues, affording to the officers charged with the duty adequate remedies for the purpose, both by action and by summary process. *City of Wilmington v. Moore*, 170 N. C., 52; *State and Guilford County v. Georgia Co.*, 112 N. C., 34. True, in *Berry v. Davis*, 158 N. C., 170, it was held that a sheriff or other executive officer charged with the duty of collecting the taxes, having the tax list in his possession, was not authorized to bring claim and delivery for personal property before levy made, but as pointed out in *Wilmington v. Moore, supra*, that ruling was approved because no lien for taxes is given by the statute on personal property before actual levy made. As to realty, however, the taxes are declared the lien on all realty of the owner from a given date, enforceable by action as well as by levy and sale; and the tax list, when placed in the collector's hands, with the fiat of the register, as clerk of the board of commissioners, endorsed thereon, are declared to have the force and effect of a "judgment and execution against the real and personal property of the person charged in such list."

In Rev., 2866, it is provided that the tax lien on realty for taxes and assessments due thereon may be enforced by action in the nature of an action to foreclose a mortgage, and judgment may be declared for the enforcement of such lien, "together with interest, penalties, and costs allowed by law and costs of action," and when such lien is in favor of the State and county the action shall be prosecuted in the name of the county. Again, in section 2912 it is provided that the holder of every certificate of purchase at a tax sale may institute this action in the nature of an action to foreclose the mortgage to enforce collection of the amounts due, on giving to the owner or occupant of the real estate 10 days written notice of his purpose to bring the suit, and the statute declares that inability to find such owner or occupant in the county shall excuse a failure to give such notice.

This section further declares that every county or other municipal corporation shall have the right to foreclose for taxes under its provisions, and it is made the duty of such corporations to diligently prosecute said suits, etc., and further, that in every action brought under its provisions, whether by private individuals or by the county or by other municipal corporation, the plaintiff shall, except in cases otherwise provided by law, recover interest at the rate of 20 per cent on all amounts paid out by him or those under whom he claims, and evidenced by certificates of tax sales, deeds thereunder, or tax receipts, etc.

The property was regularly listed for taxation, the taxes thereon duly assessed, the purchase made at a tax sale after public notice given, of which the owner was fully aware, and the 10 days written notice served on him of plaintiff's purpose to bring the present suit, and on these facts we are of opinion that the 20 per cent is collectible by the express terms of the statute. And the authorities cited do not uphold the defense contended for. In *Rexford v. Phillips,* 159 N. C., 213, the tax deed was avoided because the land had never been put on the tax list by any one having proper authority for the purpose, and it was held, therefore, that there was no tax lawfully due from the owner, justifying a sale, a principle again affirmed by this Court in *Stone v. Phillips,* 176 N. C., 457. And in *Matthews v. Fry,* 141 N. C., 582, not only was there failure on the part of the sheriff to give proper public notice of the sale, as well as serving notice on the owner personally, but the purchaser had also failed to serve the personal notice required by the statute as a prerequisite to obtaining his deed. Apart from this, both of these authorities were decisions in reference to the title, and the validity of the tax deed, and the failure to give the notice referred to having been declared an irregularity, the deeds were avoided as between the purchaser and the owner. In neither case was the question presented of the right to recover the 20 per cent interest allowed by the statute in an action to

foreclose the lien. This is imposed by way of penalty for the personal default of the owner in not meeting his share of the public burdens. Any apparent hardship that may at times arise from lack of personal notice is generally removed by the requirement that 10 days personal notice must be given the owner of the purpose to bring the suit, thus affording him another opportunity to pay his taxes and avoid the penalties and costs. In the present instance the facts show that the defendant knew all about the taxes being due, and of the time and place of sale, and knowing this, he failed for two successive years to pay his taxes, and we find no reason in law or fact for relieving him of the penalty.

In regard to defendant's having personal property available from which the tax should have been first made, it has been held by us that this fact will not of itself suffer to avoid a sale of realty. *Stanly v. Baird,* 118 N. C., 75. And it may be noted that our last two Machinery Acts, Laws 1917, ch. 234, and Laws 1919, ch. 92, both close with the express provision that a sale of real estate for taxes shall not be assailed on the ground that the tax could have been procured by sale of personal property.

There is error, and this will be certified that judgment be entered for the tax, and interest thereon at 20 per cent and costs.

Reversed.

BROWN, J., dissenting: It is admitted that defendant failed to pay his taxes for the years 1914-15. His real estate in the town of Murphy was sold by the sheriff, and, for want of bidders, under the statute, was knocked off to the county of Cherokee. It is admitted that notice of the sale was not served upon the defendant as required by Rev., 2889. It must be admitted that in the absence of any such notice the title to the property did not pass by virtue of the sale. The sheriff's deed is only presumptive evidence of the service of the notice which is completely rebutted in this case by the finding that the notice was never served. It follows, therefore, that the plaintiff has acquired no title to the property by the sale, as the sheriff failed to serve the notice. In *Matthews v. Fry,* 141 N. C., 582, this point is expressly decided, and the reason and necessity for such notice are fully stated and sustained by the citation of authorities. In that case *Mr. Justice Walker* says: "The publication of notice to taxpayers required by tax laws is an indispensible preliminary to the legality of a tax sale, and it must be in strict accordance with the statutory requirements."

It must be borne in mind that the defendant is not seeking to redeem his property from one who had acquired a good title to it at a legal tax sale. If that was the case, the defendant would have to pay the taxes and 20 per cent interest thereon. The plaintiff county, doubtless know-

ing that it has acquired no title to the property, is not seeking to recover it. The plaintiff seeks only to enforce a lien for the taxes. The defendant has tendered the taxes and six per cent interest, and I am of opinion that the plaintiff is not entitled to recover anything more. The 20 per cent interest is a penalty imposed upon one whose property has been legally sold for taxes, and who is seeking to redeem it from the purchaser. This defendant is not seeking to redeem his property, for the sale is void. He only asks to pay the taxes, together with the legal 6 per cent interest, and I think he has that right.

DUKE LAND AND IMPROVEMENT COMPANY v. THE TOWN OF MURPHY.

(Filed 20 December, 1919.)

Dedication—Acceptance—Easements—Municipal Corporations—Cities and Towns—Corporations—Officers—Principal and Agent.

Where the president, general manager, and nearly the sole owner of a corporation has gone with the commissioners of a town to see if the corporation will allow the town a part of the corporation's land for the site of a municipal reservoir, and he has orally instructed them to go ahead and use it; that it would be of benefit to the corporation, upon which the commissioners act and construct their reservoir thereon, these acts will amount to a dedication of the land by the corporation, and an acceptance by the town for the purpose of a reservoir, there being no particular form or any writing or length of time necessary for the dedication, and the authority of such officer is implied from his official character and status with the corporation.

CIVIL ACTION, tried before *Webb, J.*, at June Term, 1919, of CHEROKEE, upon these issues:

"1. Was there a dedication of an easement in the land used for a water basin of the water system of the town of Murphy, and over which pipe lines run to and from said basin, being six acres? Answer: 'No.'

"2. Is the plaintiff, Duke Land and Improvement Company, the owner of said land? Answer: 'Yes.'

"3. What damages, if any, is plaintiff company entitled to recover on account of the taking of said land? Answer: '$100.'"

From judgment rendered the defendant appealed.

M. W. Bell and Fuller, Reade & Fuller for plaintiff.
Dillard & Hill for defendant.

BROWN, J. The court instructed the jury that if they believed all the evidence they should answer the first issue "No," and the second issue "Yes." In this instruction there was error. There is evidence tending to prove that the reservoir site for which the plaintiff seeks compensation was the property of the plaintiff, and that B. L. Duke was the president and general manager, as well as director, of the Duke Land and Improvement Company, and the owner of 4,448 shares of its capital stock, the total capital stock being 4,450 shares. The defendant desired a reservoir site on the lands of the plaintiff, and so advised Mr. Duke, the president and general manager. He came to Murphy, went with the town commissioners and looked over the property site. He told them to go ahead and use it, and there would be no charge, for as, in his opinion, the waterworks would benefit him more than any one else. The town went into possession of the land, built the reservoir on it, and constructed a pipe line over its lands leading from the reservoir. After the waterworks were installed the plaintiff sold all of its property at Murphy except the small tract on which the reservoir was located, at a vastly increased price, and then sued the town for the value of the reservoir site.

We think there is sufficient evidence to go to the jury tending to prove that there was a dedication of the reservoir site to the public use, and that the president had the authority, acting for and in behalf of the plaintiff, to dedicate the reservoir site. It doesn't require any definite period of time to consummate the dedication. The principle is well stated by *Mr. Justice Hoke* in *Tise v. Whitaker,* 146 N. C., 374: as follows: "If there is a dedication, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of use is no longer material. The dedication may be either in express terms, or it may be implied from conduct on the part of the owner. . . . It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written."

We think there is also ample evidence to show that Duke had authority to act for the corporation, and that the corporation acquiesced in what he did.

A corporation which owns and deals with lands can make dedications within its power. Just how far a corporation is bound by the declaration of its officers depends upon the circumstances of each particular case, but when a use is opened by an officer of a corporation and is enjoyed by the public, the assent of the corporation will be presumed. 13 Cyc., 442.

As is said by this Court: "The powers of one who has been appointed general manager of the business of a corporation, are, in America, gen-

erally understood to be coextensive with the general scope of its business. He has, for example, the implied power to dispose of its property in the ordinary course of its business. A person dealing with the corporation through him may safely act on the assumption of his possessing this power, in the absence of anything indicating a want of it." *Watson v. Mfg. Co.*, 147 N. C., 475.

In this case Duke was not only the president and general manager of the corporation, but he was the owner of all its capital stock except two shares. It is a fair inference from all the evidence that the act of Duke in dedicating this reservoir site was acquiesced in by the other two stockholders who owned one share each, for it is manifest that Duke was the corporation and the corporation was Duke. He controlled its affairs absolutely and his corporation has received the benefit from the enhanced value of its lands growing out of these municipal improvements.

New trial.

J. W. KEENER AND C. Z. CANDLER v. J. W. DIFFENDERFER.

(Filed 20 December, 1919.)

Contracts—Options—Parol Agreements—Written Contracts—Option Price—Damages—Evidence.

Where the plaintiff has agreed by parol to give the defendant an option on his mica mine for a certain sum, with privilege of examination, and had twice offered a written option, which was promptly declined as not conforming to the agreement, and the parties then agreed to let the matter rest until the defendant should visit plaintiff's town, which he afterwards did, but did not then see the plaintiff or examine his mine: *Held*, the minds of the parties had not come to an agreement as to the option, and the mere fact that the defendant retained one of the written options tendered him not amounting to a waiver of his rights, the plaintiff cannot recover the price of the option, the subject of his action.

APPEAL by plaintiffs from *McElroy, J.*, at February Term, 1919, of JACKSON.

This action was brought to recover $300 under an oral contract by which the defendant agreed to pay the plaintiffs said sum as a consideration for an option on the plaintiffs' mica mine for 90 days. The cause was referred to J. R. Morgan, referee, who found the facts and held as conclusions of law that the contract was one relating to the sale of lands, and was, therefore, invalid under the statute of frauds, and also that the option tendered was not in compliance with the oral agreement. The referee's findings of fact and of law were adopted by the court. Judgment in favor of defendant. Appeal by plaintiffs.

Felix E. Alley for plaintiffs.
Coleman C. Cowan for defendant.

CLARK, C. J. The referee found that the plaintiffs entered into an oral agreement with the defendant whereby they agreed to execute and deliver to said defendant an option on their mica mine, with all the mining privileges, which option should be for 90 days, and for the price of $7,000. For said option the defendant orally agreed to pay the sum of $300, if the defendant should elect to purchase, and if not, said $300 to be the property of the plaintiffs. The plaintiffs, at the written request of the defendant by letter 23 September, 1915, executed and mailed to the defendant an option on said mica property, but it differed from the terms specified in the oral agreement in that $7,500 was named as the price, and the time limited for the option was different from what had been agreed upon. The defendant notified the plaintiffs of this by letter 1 October, who immediately executed and forwarded on 4 October another option in accordance with the verbal agreement; providing, however, terms for the payment of the $7,000, whereas, the terms of said payment had not been definitely agreed upon. The defendant again objected that the option sent was in this respect different from the previous agreement, and asked that the matter rest till they met. Writing from Philadelphia where he resided, under date of 13 October, 1915, to the plaintiffs at Sylva, he said in regard to this second option: "It seems that the terms in your letter of the 4th, and what you stated to me when in your office, are somewhat conflicting; however, I think it would be a better plan if we let the matter rest until I go to Sylva, which will be within a very short time. We can take the matter up in detail and embody our conversation in the option."

To this letter the plaintiffs assented by letter dated 18 October, in which they said: "If you are coming to Sylva soon, I think it a better plan to leave the matter open until you come, but if you are not expecting to come within a reasonable time, then the thing for us to do will be to straighten this out and close out the transaction. You see the way it stands at present there is nothing definite as to what anybody is going to do."

It is true the referee finds that "when the defendant later returned to Sylva he did not go to the plaintiffs and adjust their differences, but retained the option without further complaint, and did not surrender it to the plaintiffs, who had suspended their operations of the mine so that the defendant might use the property for examination, and to test it in accordance with the option." The defendant has not paid the plaintiffs the $300, and has not exercised the option to purchase the mine.

The findings of fact by the referee, approved by the court, show that neither option tendered was in accordance with the terms of the agreement, and that the parties agreed to leave the matter open until these differences were adjusted. They were not adjusted and the minds of the parties have not met. The defendant promptly notified the plaintiffs on both occasions that the option was not in accordance with the terms of the oral agreement. The fact that the defendant did not return the second option of itself was not a ratification in view of the fact that the defendant did not enter upon the mine to make an examination and test. The parties disagreed, and an option in accordance with the verbal agreement not having been furnished, and that tendered not having been accepted, the plaintiff cannot recover.

Affirmed.

J. W. POTTER v. NORWOOD LUMBER COMPANY.

(Filed 20 December, 1919.)

1. Railroads—Lumber Roads—Fires—Negligence—Defective Locomotives —Sparks—Foul Right of Way—Evidence.

Where the defendant's railway locomotive directly set fire to the plaintiff's lumber along its roadbed because of sparks from a defective spark arrester therein, or where sparks from its engine fell upon its foul right of way and set fire to the lumber, it is evidence of defendant's actionable negligence; and it is competent to show that the engine at the same place emitted many sparks immediately before and after the fire upon the question of defects therein.

2. Railroads— Lumber Roads— Fires— Insurance— Evidence— Rebuttal Evidence.

Where the plaintiff has had his lumber insured and seeks to recover damages against the defendant lumber company for negligently setting it afire, and defendant has introduced evidence tending to show that at the place the plaintiff was seen raking up trash immediately before the fire, under suspicious circumstances indicating an attempt to burn the lumber, it is competent for the plaintiff either to explain or deny the inference that he was preparing to burn the lumber in order to obtain the insurance money.

3. Railroads—Lumber Roads—Fires—Insurance—Parties—Partial Loss —Payment—Equity—Judgment—Estoppel.

Where plaintiff's complaint demands damages for the negligent burning of his lumber by sparks from defendant's locomotive, which lumber was partly covered by insurance, and the insurance company has been made a party plaintiff without objection, evidence that the insurance company has paid the loss covered by its policy is competent, and the insurer is equitably entitled to reimbursement. The defendant may not thereafter

assign for error the making of the insurer a party, which will not be prejudicial to the defendant, when, by paying the judgment apportioning the recovery, the defendant will be fully protected.

4. Appeal and Error—Prejudicial Error—Damages—Fires—Evidence—Negligence.

In an action to recover damages for the alleged negligent burning of the plaintiff's lumber, evidence as to the price paid by plaintiff for the timber from which the lumber was manufactured is but slight, or negligible, proof of the latter's value, and its exclusion is without substantial prejudice to the defendant's right when taken in connection with the other testimony of the witnesses giving more definite and accurate information as to the value of the lumber.

CIVIL ACTION, tried before *McElroy, J.*, and a jury, at Spring Term, 1919, of SWAIN.

This was an action for the burning of plaintiff's lumber yard, alleged to have been caused by the negligence of defendant, Norwood Lumber Company.

The plaintiff alleged, among other things, that he carried, at the date of the fire, an insurance policy for $2,000 with the Aetna Insurance Company, and upon proof of loss said amount had been paid by the company. The defendant denied this allegation. The insurance company filed a petition setting up the facts, and asked to be made a party, and be allowed to adopt the complaint filed by J. W. Potter. The judge granted the request, and the company was made a party plaintiff, and adopted the complaint already filed.

On the trial of the action it appeared that the lumber yard of the plaintiff was situated near the roadbed of the defendant, Norwood Lumber Company; that it had a switch at or near the lumber yard, and, on the day of the fire, one train came up to the switch at the lumber yard, and another one, drawn by what the witness termed the "Four Spot" (local name for an engine), came down the mountain, and the two engines turned around, and the "Four Spot" took the load that the other engine had and started back up the mountain; the other engine "drifted back" down the mountain, carrying the load of logs that had been brought down by the "Four Spot." The "Four Spot" had only been gone a few minutes when fire was seen in the sticks, brush, and other rubbish on the right of way between the railroad and the lumber yard. The wind was blowing from the track of the railroad toward the lumber yard. The engine, as it went up the mountain threw sparks and set the woods afire in several places. The right of way of the railroad was foul, lumber strips and other trash had accumulated thereon, and had been allowed to remain. There was evidence that the "Four Spot" did not have a spark arrester, and evidence to the contrary.

Verdict and judgment for the plaintiff, and defendant appealed.

Felix E. Alley and Merrimon, Adams & Johnston for plaintiff.
Thos. S. Rollins and S. W. Black for defendant.

WALKER, J., after stating the facts as above: We will consider the assignments of error in the order they are stated in the record:

1. It was competent to prove that the engine emitted many sparks immediately before and after the burning, so as to show its defective condition, these sparks having fallen upon the foul right of way and caused the fire. *Knott v. R. R.*, 142 N. C., 238; *Whitehurst v. R. R.*, 146 N. C., 588; *Armfield v. R. R.*, 162 N. C., 24; *Cheek v. Lumber Co.*, 134 N. C., 225; *Williams v. R. R.*, 140 N. C., 623; *Cox v. R. R.*, 149 N. C., 117; *Currie v. R. R.*, 156 N. C., 419; *Aman v. Lumber Co.*, 160 N. C., 370; *Perry v. Mfg. Co.*, 176 N. C., 68, and *Williams v. Camp Mfg. Co.*, 177 N. C., 512, and cases cited. It can make no difference, as the cases above show, whether the sparks came from a defective engine or dropped on a foul right of way, as either act of negligence was sufficient to carry the case to the jury. *Knott v. R. R., supra.*

2. There was testimony to the effect that Potter was seen raking up trash, as if to set it afire, just before the fire started, and, in order to refute the charge, it was certainly competent for him to deny or explain it, and to show that he was not trying to burn the property for the insurance. The case of *Lytton v. Marion Mfg. Co.*, 157 N. C., 331, where it was attempted to prove that the *defendant* was insured, has been called to our attention, but it does not change our view, as we have decided the case, with respect to the insurance, upon the ground that the defendant was charging plaintiff, impliedly, at least, with having burned the property to get the insurance, and plaintiff had the right to reply to the accusation, and also to explain what was stated by one of the witnesses, that he was seen at the lumber piles and it appeared as if he was raking up trash as if to burn it, or words to that effect. Besides, there was no objection when the insurance company was made a party. It claimed a part of the fund, which has been allowed in the judgment. If it be conceded that the action must be brought in the name of the insured, when the insurance is less than the actual loss, it appears in this case that the amount of the policy has been paid by the company to the insured, and it is equitably entitled to reimbursement.

3. The defendant cannot now be allowed to assign as error the order of the court making the insurance company a party, as it made no objection to it at the time the order was made, and, besides, we cannot see how it is prejudiced by the order, as it will be protected, if it pays the judgment for the damages recovered by the plaintiff, J. W. Potter. If the insurance company gets a part of the money, of what concern is that to the defendant? It makes no difference who gets the money if the

defendant is fully discharged. *Newsom v. Russell*, 77 N. C., 277, where it was said by *Justice Bynum:* "What interest is it to the defendant if he is absolved from further liability by payment of his debt upon a judgment regularly obtained against him?"

4. The evidence admitted as to the payment of the insurance did the defendant no harm for the reason just stated, and, also, because it was not denied that a policy had been issued, the defendant even charging that plaintiff had burned the property to get the insurance money. All this evidence, taken connectedly, was competent to rebut this serious imputation against the plaintiff. The insurance had been taken out by J. M. English & Company, without Potter having knowledge of it up to the time of the fire. The loss, if any, was payable to J. M. English & Company, and the evidence proved how much of the recovery should go to the insurance company, and this amount ($2,000) was directed in the judgment to be paid to the company. *Powell v. Water Co.*, 171 N. C., 290.

5. The remaining exception is without merit. What Potter paid Stovall for the timber, not the lumber, was very slight proof of the latter's value, if proof at all, and its exclusion worked no substantial harm to the defendant, especially in view of the fact that Stovall, the same witness to whom was put the question, as to the price of the timber, was examined, at length, as to the quantity and value of the lumber, and there was elicited far more definite and accurate information as to how much lumber was on the yard. The defendant was evidently not prejudiced by the court's ruling. *S. v. Stancill*, at this term, 178 N. C., 683 (100 S. E., p. 241).

There is no error, and it will be so certified.

No error.

D. C. BURGER v. W. T. COOPER.

(Filed 20 December, 1919.)

1. Contracts—Breach—Claim and Delivery—Replevin—Damages—Statutes—Cattle.

Where the defendant has breached his contract of warranty of horses which he had traded for the plaintiff's mules, and thereupon the plaintiff had taken the horses home and kept them, the upkeep of the horses about equaling the benefit the plaintiff derived therefrom; and in plaintiff's action to recover possession with ancillary remedy of claim and delivery, the defendant kept and sold the mules under a replevy bond: *Held*, there being no allegation in the complaint except for the detention of the mules,

the measure of damages for the plaintiff is the difference between the ascertained value of the mules and horses, and interest thereon. Rev., 795.

2. Appeal and Error—Judgment Modified—Premature Appeal—Costs.

The appeal in this case may have been dismissed as premature, and the judgment appealed from being modified, the costs are taxed equally between the parties.

APPEAL by defendant from *Webb, J.*, at the June Special Term, 1919, of CHEROKEE.

This is an action to recover possession of two mules in which claim and delivery proceedings were resorted to, and the defendant gave bond, retained the mules, and sold them before the trial.

The plaintiff offered evidence tending to prove that on 2 April, 1917, he delivered to the defendant the two mules in exchange for a horse and mare and $25, with the understanding that if the horse and mare were not satisfactory the trade should be rescinded and the mules returned to him; that on the next day, finding that the horse and mare were not satisfactory, he carried them to the stables of the defendant and demanded the return of the mules, which was refused; that he then took the horse and mare to his home and retained them in his possession until the trial; that their services were not worth the expense of feeding them.

The evidence of the defendant contradicted all of this evidence in behalf of the plaintiff.

The jury returned the following verdict:

"1. Did the plaintiff and the defendant exchange horses and mules upon the conditions set forth in the plaintiff's complaint? Answer: 'Yes.'

"2. Is the plaintiff the owner of the mules referred to and described in the plaintiff's complaint? Answer: 'Yes.'

"3. What was the value of the mules at the time that they were replevied by plaintiff? Answer: '$250.'

"4. What was the value of the horse and mare at the time plaintiff took them into his possession? Answer: '$175.'

"5. What damage, if any, has plaintiff sustained by reason of defendant's replevy of the mules in question? Answer: '$200, with interest.'"

His Honor entered judgment in behalf of the plaintiff for the sum of $50, it being the difference in the value of the stock as fixed by the jury, with interest thereon from 4 April, 1917.

He also ordered that the answer to the fifth issue be stricken out, and that that issue be submitted to another jury, to which last order the defendant excepted and appealed.

No counsel for plaintiff.
Edmund B. Norvell for defendant.

ALLEN, J. The only exception in the record presents for review the correctness of the ruling setting aside the finding upon the fifth issue of damages with directions to resubmit the issue to another jury, and in this there was error.

The plaintiff alleges no damages in the complaint except for the detention of the two mules, which the statute (Rev., 795) fixes at interest on the value of the property at the time of the seizure, and this has been awarded him in the judgment.

He does not allege that he was compelled to incur expense in feeding the horse and mare, and, on the contrary, he shows by his own evidence that after the defendant refused to rescind the trade and return the mules, he voluntarily took the horse and mare from the stables of the defendant, where he had placed them, and carried them to his own home and kept them, and it also appears from the verdict that there was very little difference in the value of the horse and mare and the mules, indicating that he preferred to keep what he had, and that he thought their services were worth their feed.

The judgment must therefore be modified by striking out the order directing that the fifth issue be submitted to another jury.

The costs of the Supreme Court will be divided between the plaintiff and defendant, as the appeal might have been dismissed as premature.

Modified and affirmed.

FRANK ELLIOTT v. THE CRANBERRY FURNACE COMPANY.

(Filed 27 December, 1919.)

1. Employer and Employee—Master and Servant—Safe Place to Work and Approaches.

An employer of labor, in the exercise of reasonable care, is required to provide for his employee a safe place in which to do his work, this obligation extending to approaches to it where they are under the employer's control and in the reasonable scope of his duties.

2. Same—Negligence—Evidence—Injury Reasonably Anticipated—Questions for Jury—Trials.

Where the owner of mines, operated upon different levels under a mountain, approached from the outside by tracks leading into tunnels, with a main track from which other tracks branched out, and there is evidence tending to show that after the cars, operated upon the various tracks, had been loaded, they were allowed to run down the slopes by gravity; that the employees in changing shifts had been accustomed to use the tracks as a pathway while going to and returning from work, the remaining pathway along the track having fallen into disuse and being dangerous

with obstructions and pit holes, making the use of the track necessary; that plaintiff, in the course of his employment, had stepped from and back upon the track after allowing several of these cars, running down the slope, to pass, at a place where the light was dim, and was struck and injured by a detached car 15 or 20 feet behind those that had just passed, without light or lookout thereon: *Held*, sufficient upon the question of the defendant's actionable negligence, and as a result that would likely follow from the cars running down the track, under the circumstances, where it knew its employees would pass to and from their work.

3. Employer and Employee—Master and Servant—Negligence—Contributory Negligence—Railroads—Tramroads—Stepping Upon Track—Look and Listen—Evidence—Questions for Jury—Trials.

The doctrine that one who has received an injury from passing cars by stepping from a place of safety on to a railroad track, without looking or listening, is guilty of contributory negligence in failing to be properly attentive to his own safety, is not near so insistent where the injured party is on the track in the line of his duty or by license of the railroad company, and the facts and circumstances may so qualify the obligation as to require the question to be submitted to the jury.

4. Same.

Where there is evidence of the defendant's actionable negligence in permitting an empty car to run down the slope of its mine, to the plaintiff's injury, as he stepped upon the track, customarily used as a walkway by the defendant's employees, after he had stepped aside, where the light was very dim, at four o'clock in the morning, for several other of these cars to pass, some of them coupled together, the car causing the injury closely following, without light or warning given: *Held*, though the plaintiff could have seen this car had he looked back, and remained in safety, this could not be held for contributory negligence, as a matter of law, under the circumstances of this case, and this question was an open one for the jury.

CIVIL ACTION, tried before *Long, J.*, and a jury, at June Term, 1919, of AVERY.

Plaintiff claimed and offered evidence tending to show that as an employee of defendant company engaged in working in its mines at Cranberry, and while walking along the track of said company, he was knocked down by a car negligently operated by defendant on said track, and seriously injured by the car running over his leg. There was denial of negligence by the company and plea of contributory negligence on the part of plaaintiff. On issues submitted there was judgment for plaintiff, and assessing damages for the injury. Judgment on the verdict, and defendant excepted and appealed.

J. W. Ragland, V. B. Bowers, and J. J. Hayes for plaintiff.

J. H. Epps, J. P. Johnson, F. A. Linney, and Merrimon, Adams & Johnston for defendant.

HOKE, J. The facts in evidence tended to show that defendant company was mining iron ore at Cranberry, N. C., and, as we understand the testimony, the ore was being taken from the mine at different levels under the mountain and approached from the outside by tracks laid in tunnels, the main track being designated as slope No. 5, and about a quarter of a mile or so from the entrance another track branched off from this, going to a different opening and known as slope No. 3; that in conveying ore from the mine the empty cars were taken in with an engine, and after being loaded they were later allowed to run down the slopes by gravity. That at each opening there were different squads of hands engaged, divided into night and day shifts, and the loaded cars were usually started down the slopes at or soon after the time the respective shifts quit their period of work. That the employees, in coming out from their work, walked down the tracks, this being a smooth, dry way, and had been accustomed to do this for several months past. That there were spaces on either side of the track of 4 to 5 feet, but these were uneven and rocky, and at places there were obstructions or pits or holes, making it necessary to take the track, and the middle of the track, as stated, was the path they all took; that there has been a plank walkway safe and suitable for the hands, but for some reason, on moving the shop or shops of the company on one of the slopes, this walkway had been discontinued, was no longer lighted, and at places it was to some extent obstructed. That there were lights along the track at places, but at the point of the injury the evidence was to the effect that the lights were very dim. That there were usually 40 to 45 hands coming out along the track after the night shifts quit work. That plaintiff was an employee on the night shift on slope No. 3, and on 8 February, 1919, about 4 a.m., the hour when he usually quit work, he and two or three others were walking down the track or standing in the space at the side, at a point not far below where No. 3 slope left No. 5, when 15 to 18 loaded cars rolled by—in a bunch, or so near it as to appear that way—the larger part of them coupled together, and with some car boys on the forward cars. That plaintiff, on the side, was approaching an obstruction or hole, and making it necessary for him to get back on the track or cross it, and as the bunch of cars passed he stepped back on the track and was immediately struck by a detached car 15 or more feet behind the others, and which was without lights or any one on it. The car ran over his leg, causing painful and serious injuries, etc.

It is the fully established principle with us that an employer of labor, in the exercise of reasonable care, is required to provide for his employee a safe place in which to do his work, and our decisions hold that the obligation extends to the approaches to it when they are under the employer's control and in the reasonable scope of this duty. *Kelly v.*

Power Co., 160 N. C., 283; *Myers v. Lumber Co.*, 129 N. C., 252; *Deligny v. Furniture Co.*, 170 N. C., 189; *Kiger v. Scales*, 162 N. C., 133; *Norris v. Cotton Mills*, 154 N. C., 474; *Vaden v. R. R.*, 150 N. C., 700.

Under the conditions presented in the evidence, the defendant company should have provided a safer way, and kept it in proper condition, by which these employees could have gone out from their work, and further, it was a negligent breach of duty and of a pronounced type for defendant to allow a lot of loaded cars, day by day, to be started down this track without lights or adequate control or warning provided at a time when it was known that numbers of its employees would be on this track, and so exposed to very real danger. It was not only probable, but well-nigh certain that serious injury would be the result to one or more of them, and under the principle of the cases cited, and others of like kind, the court committed no error to defendant's prejudice in submitting the issue on the defendant's negligence as an open question to the jury.

And as to the conduct of the plaintiff considered on the issue of contributory negligence, it is the well considered rule that an employee should always be properly attentive to his own safety, and it has been time and again held that when one has stepped on a railroad track, and especially at a time when there is likelihood of a car passing, it will usually amount to contributory negligence as a matter of law, but this is not always nor necessarily true.

An examination of the authorities on the subject will disclose that the principle referred to is not near so insistent where the injured party is on the track in the line of his duty or by license of the company, and in *Sherrill v. R. R.*, 140 N. C., 252, it was said that while one who voluntarily entered on a railroad track without looking or listening, is usually held guilty of contributory negligence, the facts and attendant circumstances may so qualify the obligation as to require the question to be submitted to the jury.

A similar ruling was made at the same term in *Cooper v. R. R.*, 140 N. C., 209, and the position has been again and again approved in our decisions. *Lutterloh v. R. R.*, 172 N. C., 116; *Johnston v. R. R.*, 163 N. C., 431; *Fann v. R. R.*, 155 N. C., 136; *Wolfe v. R. R.*, 154 N. C., 569; *Farris v. R. R.*, 151 N. C., 483.

While plaintiff testifies that if he had looked back he might have seen this car, or if he had remained where he was he would have escaped injury, the facts in evidence also show that plaintiff was not a trespasser in the use of this track, but that it was the usual and practically the only way provided by the company for the hands in going from their work; that at the place of the injury the lights were very dim; that a large bunch of cars, apparently fastened together, had just passed; that

his attention was for the moment distracted and his hearing interfered with by these cars; that the point at which he was standing was near an obstruction or pit, just ahead, which required that he go back upon, or across, the track, and as he did so he was struck by a stray or detached car separated from the others, which approached without any light or person to give warning. Under these, the attendant circumstances, we think that the plaintiff might have reasonably concluded that all the cars that were anywhere near had passed in the first lot, and that under the principles recognized and approved by these authorities, the court was justified in submitting the question of contributory negligence also as an open one to the jury.

On careful examination we find no error in the record, and the judgment for plaintiff is affirmed.

No error.

CLARK, C. J., concurring: Concurs in the opinion of *Mr. Justice Hoke* in every respect. Counsel in this case, as in some others, intimated that juries are too prone to give verdicts against corporations in actions for personal injuries, and counsel on the other side stressed the value of juries.

The right of trial by jury is based upon long experience, and is confirmed as a right in both State and Federal Constitution. Like all human institutions, it is not perfect, but the experience of the ages is that there is no better means of reaching an impartial determination on the facts in dispute than the verdict of twelve good men and true who are summoned from the body of the county, and who, when their duty is done, return whence they came. When there is any serious miscarriage it is not due to the jury system, but to defects in its operation as by not using sufficient care to secure an impartial and intelligent jury by purging the jury box of incompetent or unfit persons, or in other respects. There is little doubt that the verdict of juries on the facts are correct fully as often, if not oftener, than the decisions of the trial judges upon the law. The errors of the latter are supposed to be corrected on an appeal, but there is a speedier method of correcting the errors of the jury, for the presiding judge has the discretion to set aside the verdict if it is palpably contrary to the weight of the evidence, or procured by bias or improper means. The jury for the ascertainment of facts is the democratic feature of our administration of justice. It adds to public confidence in the courts beyond that which obtains in countries where the facts are ascertained by a judge and not by a jury.

On the other hand, the verdicts obtained against corporations in favor of employees are not often due to the bias of juries against corporations. Juries, as a rule, seek to ascertain and determine the merits of the case

submitted to them. They feel that, as a matter of justice, when an employee in a great business has been injured in the scope of his duties the loss sustained should be taxed against the business in which he is engaged, and should not fall upon the family of the employee who has been killed or crippled. And such is general opinion. For this reason the former ruling that an employee could not recover where the negligence of a fellow-servant contributed to the injury has been repealed by statute in this and most other States.

For the same reason, though the negligence of the injured party contributed to his death or injury, both the U. S. statute and that of this State now provide that in cases where the injury occurred in railroad service, contributory negligence shall not be a full defense, but the loss shall be prorated according to the degree of negligence shown by the company and the employee. Furthermore, in many States there are now Employees' Compensation acts determining what amount of compensation shall be allowed in all cases of personal injuries, irrespective of any negligence shown by the injured party. This action of the legislative bodies but evinces the general sentiment expressed by juries in their verdicts that the loss sustained by the injury or death of the employee while in the service of the company shall be charged upon the business and not fall wholly upon the family of the unfortunate employee. The world has grown more just in its views as to those who create the wealth of the world and bear the bulk of its burdens while receiving a minimum of recognition.

H. E. ALLEN ET AL. v. E. McQUEEN SALLEY.

(Filed 27 December, 1919.)

1. Actions— Defenses— Pleadings— Pendency of Actions— Dismissal — Statutes.

A demurrer to a complaint, setting up the prior pendency in another county of an action upon the same subject-matter between the same parties, will be sustained, Rev., 474 (3); and, when such allegations do not so appear in the pleading, objection to the pendency of the second action may be taken by answer. Rev., 477.

2. Same—Counterclaim—Judgments.

The entire spirit of our code procedure is to avoid multiplicity of actions, and where an action for damages arising by tort from a collision between automobiles has been brought by one of the parties, he may successfully plead the pendency of this action to one brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the second action being by way of counter-

claim, Rev., 481 (1); and that relief may be asked for by each in his own action does not affect the fact that the subject of both actions is the same acts or transactions, to be determined by one judgment either for the plaintiff or defendant in the case. Rev., 563 (2).

APPEAL by defendant from *Ray, J.*, at May Term, 1919, of BUNCOMBE.

This is an action to recover damages as the result of a collision between an automobile truck belonging to the plaintiffs, and an automobile belonging to the defendant on Biltmore Avenue, near Asheville, 30 March, 1919. The defendant, prior to the bringing of this action, had brought an action against the plaintiffs in Polk County, where he resided, for damages arising out of the same collision. The summons in that action was served and returned prior to the beginning of this action by the plaintiffs. At the return term of the summons in this action, the defendant filed his plea setting up the pendency of the action in Polk, and moved to dismiss this action because of the institution of the prior action pending in Polk, between the same parties, and in regard to the same subject-matter. The motion to dismiss was denied, and the defendant appealed.

Edwin S. Hartshorn for plaintiffs.
Walter Jones for defendant.

CLARK, C. J. The defendant filed a certified copy of the summons, complaint, and answer in the action brought by him for exactly the same collision in Polk County. A demurrer would lie if the pendency of the former action appeared on the face of the complaint. Rev., 474 (3), but Rev., 477, provides: "*Objection not appearing in the complaint.* When any of the matters enumerated (above) do not appear on the face of the complaint, the objection may be taken by answer." The certified copy of the summons, complaint, and answer in the action brought by the defendant in Polk County show identically the same collision as set out in the complaint in this action, and defendant pleads the identity of the transaction. It is so treated by the judge, who says in his judgment that the defendant moved to dismiss this action "On the ground that another action between the same parties, and about the same transaction and subject-matter, was pending in Polk County at the time of the institution of the above entitled action, and the court, being of the opinion that the defendant is not entitled to have this action dismissed *on the grounds alleged*," overruled the motion. The briefs of the plaintiff and defendant in this Court concede the identity of the cause of action, the plaintiff contending that though the facts show one and the same collision, that the causes of action were different because the plaintiffs in this action claim that the defendant was negligent, and the

defendant in the prior action instituted by him claimed that the plaintiffs in this action were negligent—but this was a distinction without a difference. The jury are to find the facts, and the court instructs as to the law thereon, and, whatever the result, there was but one set of acts and only one occurrence. There can be only one judgment, for plaintiff or for defendant, in the case. Rev., 563 (2). It would be unprecedented to divide this action into two so as to compel the same witnesses to the same transaction to attend trial of the action first begun (in Polk), and then to require the same witnesses to attend trial and testify to the same state of facts in Buncombe. The two juries might give different verdicts, and the judges might give conflicting constructions of the law.

The entire spirit of the Code is to avoid multiplicity of suits, and, therefore, Rev., 481 (1), authorizes a defendant to plead as a counterclaim any "cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action." This was intended to authorize the claim and counterclaim to be settled in one action, when there is another contract or a matter *"arising* out of the same contract or transaction," which could not have been pleaded at common law, but it was not intended to divide into two actions and authorize two suits to be brought upon the *same* contract or transaction, which would be the case here if after the defendant has sued the plaintiffs for the collision the defendants in that case could sue the plaintiff therein for the same collision. In fact, however, the defendant herein has not pleaded a counterclaim nor did the defendants in the former case. The defendant in this case has pleaded the "pendency of the former action for the same cause," as authorized by Rev., 477. The cause is identical, for it is on the same acts, by the same parties. What the remedy will be and whether the verdict and judgment will be for the plaintiff or the defendant is to be determined in that suit.

At common law, as still is the case, when two men fight, even by consent, either may bring an action for the assault, but it is not held that there may be two actions, *Bell v. Hansley,* 48 N. C., 131; the language of the headnote is "One may recover in an action for assault and battery though he agreed to fight with his adversary."

In *Francis v. Edwards,* 77 N. C., 275, *Bynum, J.,* says: "A counterclaim is a distinct and independent cause of action, and when properly stated as such, with a prayer for relief, the defendant becomes, in respect to matters alleged by him; an actor, and there are then really two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant. The defendant is not obliged to set up this counterclaim. He may omit it and bring another action. He has his election. But when he does set up his counterclaim,

it becomes a cross action, and both opposing claims must be adjudicated. The plaintiff then has the right to the determination of the Court of all matters thus brought in issue, and equally, the defendant has the same right, and neither has the right to go out of Court before a complete determination of *all the matters* in controversy without or against the consent of the other. This is the proper construction of the provisions of the Code in relation to counterclaim. Any other construction would defeat or impair these equitable and economical provisions of it, by which all matters in controversy between the parties to a suit may be determined in the same action" (citing many cases). All this contemplates one action. The object of the Code was to allow many other matters than the original contract or transaction to be settled in the same action, and there was no intention to divide into two actions a suit brought upon the same contract or the same transaction. The same matter is discussed by *Ashe, J.,* in *Hurst v. Everett,* 91 N. C., 399, who says that the object of the Code provision was to reduce the number of actions.

Rev., 563, settles the matter clearly by providing that the judgment may be given "for or against one or more of several plaintiffs, and for or against one or more of several defendants; and may determine the ultimate rights of the parties on each side, as between themselves, and may grant to the defendant any affirmative relief to which he may be entitled."

There is in this case but one cause of action, the collision, and the remedy sought by plaintiffs and that sought by the defendant depends upon identically the same state of facts, and must be settled in one action. The proper procedure in a case of this kind is that pursued in the Admiralty Courts, where in the case of collision both vessels are before the Court, and the wrongdoer ascertained, or where both parties are in fault, the damages and costs are assessed in proportion to the wrongful conduct of the parties. 7 Cyc., 376-378. This is also the case now in action against a railroad company for personal injuries when contributory negligence is pleaded.

In *Alexander v. Norwood,* 118 N. C., 382, the Court said: "The purpose of the Code system is to avoid a multiplicity of actions by requiring litigating parties to try and dispose of all questions between them on the same subject-matter in one action. Where an action is instituted and it appears to the Court by *plea,* answer, or demurrer that there is another action pending between the same parties, and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed."

In that case the Court said that "the plaintiff (in the second action) has no election to litigate in the one or bring another action, but must

set up his defense in the first action, *Rogers v. Holt,* 62 N. C., 108, and the court will *ex mero motu* dismiss the second action as the parties, even by consent, cannot give the court jurisdiction." *Long v. Jarratt,* 94 N. C., 443.

In *Cooper v. Evans,* 174 N. C., 413, *Hoke, J.,* said, quoting with approval from *Smith v. French,* 141 N. C., 10: "Both the spirit and the letter of our present Code design and contemplate that all matters growing out of or connected with the same controversy should be adjusted in one and the same action." There are numerous decisions to the same effect.

The collision was but one transaction, and the whole matter should be tried and the liabilities of all the parties determined, in the first action, which is still pending in Polk.

The plaintiffs in the second action complain that it will be an inconvenience to them to try the case in Polk. It will be exactly the same inconvenience for the plaintiff in the first action to be brought to Buncombe to try the case there as a defendant. Besides, if plaintiffs' contention were right, both parties would go to both counties for trial. Neither under common law, nor by the Code, is there a single precedent of dividing an action up and trying it twice when the cause of action is the same contract or the same tort. The Code provision is in the other direction of preventing multiplicity of actions by allowing counterclaim when it is another contract, or *arises* out of the transaction or contract which is the cause of action—not to divide it into two actions when it is on the same contract or transaction.

There cannot be two actions between the same parties for the same cause, whether on contract or tort. To prevent that, on a plea or demurrer, for "pendency of a former action for the same cause" the second action must be dismissed.

Reversed.

IN RE PETITION FOR INCREASE OF STREET CAR FARES IN THE CITY OF CHARLOTTE, THE SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONER, AND THE CITY OF CHARLOTTE, RESPONDENT.

(Filed 27 December, 1919.)

1. Statutes—Police Powers—Municipal Corporations—Cities and Towns—Railroads—Street Railways—Passenger Fares—Contracts—Private Rights—Constitutional Law—Carriers of Passengers.

The Legislature, either directly or through appropriate governmental agencies, has the power to establish reasonable regulations for public-service corporations in matters affecting the public interest; and where

such corporations have devoted their property to the public use and are operating under a legislative charter and exercising the right of eminent domain therein conferred, they are, in a peculiar sense, subject to the police power of the State conferring it, to which, when properly exerted in reference to these companies, the proprietary rights of individual ownership must, to that extent, be subordinated to the public welfare.

2. Same—Corporation Commission.

A corporation commission is created under the provisions of our statute, Rev., 1054, *et seq.* (ch. 20), giving it general supervision over railways, street railways, and like companies of the State, and empowering it to fix such rates, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these being police powers delegated to this commission, governmental so far as they extend, a public service street railway company, operating under a city charter, and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized in conformity with the act, to raise its charges to its passengers, when in the opinion of the commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service.

3. Same—Appeal and Error.

Under the provisions of our statute, Rev., 1054, *et seq.* (ch. 20), any party affected by the order of the corporation commission as to rates or charges for passengers by a street railway company, etc., is given the right of appeal to the courts from such order, and the rate of charges so fixed are to be considered just and reasonable charges for the services rendered, unless and until they shall be changed or modified on appeal, or the further action of the commission itself, approving *R. R. v. R. R.*, 173 N. C., 413.

4. Same—Discrimination.

A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the corporation commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons.

5. Corporation Commission—Railroads—Street Railways—Passengers—Rates—Municipalities—Contracts—Parties—Appeal and Error—Carriers of Passengers.

It is the duty and assuming the right of a municipality granting its charter to a corporation to operate a street car system therein (Rev., 2916, subsec. 6), and which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon petition filed by the railway company before the corporation commission requesting that it be permitted to raise the fares beyond those limited in the contract, and the municipality may appeal through the courts as the statute prescribes, when the order is adverse to it or the interest it represents, as a "party affected by the decision and determination of the commission," expressly provided for by the statute.

Proceedings instituted before the Corporation Commission for an increase of street car rates, heard on appeal before *Adams, J.*, at February and March Term, 1919, of Mecklenburg.

The petition was filed by the Southern Public Utilities Company, operating street cars in the city of Charlotte, and in which it was alleged "That on account of the abnormal increase in the price of steel, copper, cars, and all equipment and material, and the increased cost of labor incident to our business, your petitioner cannot profitably nor properly conduct its street railway at the present pre-war rates." That it had been charging a 5-cent fare with eleven tickets for 50 cents, and closed with the prayer that it might be granted the privilege of increasing said rate to 7 cents, with the understanding that the company would sell four tickets at 25 cents.

The city of Charlotte, made a party by notice issued by direction of the commission, appeared and resisted the application. The hearing was set for 8 July at the city of Raleigh; the parties appeared, and on suggestion from the city's counsel that as the developments of the hearing might render a further presentation of facts necessary on the part of the city, they would ask for that privilege. The chairman replied that it was the purpose of the commission to get at the real facts with as little formality as possible, and that if it became necessary to make further investigation to set forth the substantial facts, opportunity would be given. The hearing was then entered upon, no formal answer having been filed.

For the petitioner, the president of the company was examined, making an elaborate statement of conditions, which it was claimed justified the proposed increase.

On the cross-examination the city of Charlotte sought to disclose that the facts and conditions presented did not justify the increase. That the company had given an overvaluation of the property, and had made excessive claims for depreciation, etc.

At the close of the examination of this witness, the taking of the oral testimony was not further pursued.

The following day the company, by leave given, submitted to the commission certain data in illustration and support of the oral evidence of its president.

On 13 July, 5 days after the first hearing, pursuant to leave given, the city of Charlotte filed its formal answer resisting the application in terms as follows:

"The city of Charlotte, in behalf of the citizens and patrons of the street car service of the petitioner, responding to the petition in the above entitled matter, say and allege as follows:

"1. That as this respondent is advised and believes, the valuation placed on the property of the petitioner, for which and upon which it claims the returns of its street railway system is excessive and larger than the actual value of said property, and that if a fair valuation is placed on such property the returns from the operation thereof at present prices would be adequate to cover all operating expenses, including overhead expenses and a reasonable sum for depreciation, and would in addition thereto yield the petitioner such a return upon the investment as should be satisfactory to the petitioner in war times, when all of the citizenship as well as corporations are necessarily being called upon to bear extraordinary burdens incident to the war, and to conduct their business at either no profit or at a much less profit than under normal circumstances.

"2. That in arriving at the amount to be set aside for depreciation, no sum should be allowed for depreciation on real estate within the city of Charlotte, as such real estate not only does not depreciate in value, but actually enhances in value from year to year with the development and growth of the city.

"3. That if the petitioner is entitled to amortize the cost of the Camp Greene line, it is certainly not entitled to amortize the entire cost thereof, as it is manifest that at the end of the three-year period, which is the estimated life of the said Camp Greene lines, there shall be salvaged in the materials entering into the construction of such Camp Greene lines; and in any amortization of the cost of such lines, this salvage should be taken into consideration and be deducted from the amount of the cost of such lines.

"For further and sufficient answer to the plaintiff's petition, this respondent says:

"1. That the petitioner, the Southern Public Utilities Company, is the successor to the Charlotte Electric Railway Light & Power Company, which latter corporation is in turn the successor to the Charlotte Street Railway, which was incorporated by an act of the General Assembly of North Carolina in the session of 1883.

"2. That on 29 September, 1886, the city of Charlotte and the Charlotte Street Railway Company entered into a contract, by the terms of which the said street railway company was granted the right and franchise to maintain and operate a street railway upon the streets and avenues of the city of Charlotte, and in return for which right and franchise the said street railway company contracted and agreed that not more than 5 cents be charged by said street railway company as fare for one continuous ride, from 6 a.m. to 10 p.m., within the city limits, and thereby contracted and agreed to a rate satisfactory to it for the performance of such service; and this petitioner, as the suc-

cessor of the Charlotte Street Railway Company, is clothed with such rights and bound by such terms of said contract and agreement; a copy of which contract and agreement is hereto attached and made a part of this answer, and is hereby especially pleaded and offered in answer and bar to the petition herein.

"Wherefore, the city of Charlotte respectfully prays that the petition in the above entitled matter be dismissed."

And in support of this further answer it was shown that:

"The Charlotte Street Railway Company was incorporated by the General Assembly at the session of 1883, and was authorized to establish a street railway service in the city of Charlotte. On 29 September, 1886, a written contract was made by this railway company and the city, in which is the following: 'Resolved that whereas the constructing and operating of lines of street railway will be of material benefit to the citizens of Charlotte, the said city agrees that it will not charge or collect a greater sum than $25 per annum upon the plant property and franchise of the said street railway company for the period of ten years; provided that not more than 5 cents be charged by said street railway company as fare for one continuous ride, from 6 o'clock a.m. to 10 o'clock p.m., within the city limits.'

"The name of the Charlotte Street Railway Company was thereafter changed to the Charlotte Electric Railway Light & Power Company, to whose rights and franchises the petition has succeeded."

On consideration of the facts in evidence, the commission made an order granting the prayer of the petitioner, the said order being in terms as follows:

"The hearing of this petition was had at the office of the commission on 18 July, 1918; and it appearing clearly to the commission that this company cannot operate and continue to give good service at the rate they were receiving under present conditions, it is, therefore, ordered that the Southern Public Company be, and it is hereby, authorized to charge a fare of seven cents for the transportation of passengers over its street railway lines located in the cities of Charlotte and Winston-Salem; that this company shall also be required to put on and offer for sale to the public in general four tickets for twenty-five cents. The company is also authorized, if it shall deem it advisable, to put on and offer for sale to the public generally books containing seventeen tickets for the sum of one dollar per book.

"This order to become effective 1 August, 1918.

"This 30 July, 1918."

From this order the defendant, the respondent, gave notice of appeal as follows:

"To the Honorable the Corporation Commission, Raleigh, N. C.

"Whereas, in the above entitled matter, the Corporation Commission overruled the exceptions filed by the city of Charlotte to the order of the Honorable, the Corporation Commission, authorizing the Southern Public Utilities Company to increase its fares for street car service in the city of Charlotte.

"Now, therefore, the respondent, the city of Charlotte, does hereby appeal from such order and rulings to the Superior Court, in term, and does herewith give to the Honorable Corporation Commission notice of such appeal, and prays the Honorable Commission to accept these premises as notice of such purposes and intention."

And filed exceptions and assignments of error as follows:

"The city of Charlotte herewith excepts to the order of the Honorable Corporation Commission overruling the respondent's exceptions to the order of the Honorable Commission, authorizing the Southern Public Utilities Company, a corporation, engaged in the street railway business in the city of Charlotte, to increase street car fare in said city, and groups its exceptions and assignments of error as follows:

"1. That the Honorable Corporation Commission found as a fact that the Southern Public Utilities Company 'cannot operate and continue to give good service at the rate they were receiving under present conditions.'

"2. That the Honorable Commission did not find from the evidence before it any facts upon which to base its order as tending to show the necessity for such increased rates.

"3. That the Honorable Commission did not have before it any competent evidence showing the valuation of the property used by the petitioner in its street railway system in the city of Charlotte.

"4. That the valuation placed upon such property by the petitioner, and accepted by the Honorable Commission, was excessive and larger than the true and actual value of such property.

"5. That the sum claimed by petitioner for depreciation was excessive, and much larger than a fair and reasonable allowance on such account.

"6. That the Honorable Commission permitted the petitioner to amortize its Camp Greene lines within ten years without salvage or without credit as an asset.

"7. That the Honorable Commission failed and refused to hold that the petitioner was bound by the terms of the contract between the city of Charlotte and the Charlotte Street Railway Company, the predecessor of the petitioner, under date of 28 September, 1886.

"8. That the Honorable Commission did not order and require the petitioner to put on and offer for sale to the public, books containing seventeen (17) tickets for the sum of one dollar ($1) per book.

"Wherefore, the respondent prays the Honorable Corporation Commission to transmit its record to the Superior Court for such further and other proceedings as there may be had, according to law."

The appeal was allowed by the commission over the protest of the petitioner, who claimed that no appeal would lie under such order except by the utilities or railway company, whose rates or interests are thereby affected.

The record having been duly certified to the Superior Court, to February Term, 1919, where the proceedings pertinent are given in the case on appeal, the petitioner filed written motion to dismiss in terms as follows:

"1. That the city of Charlotte is not a party to this proceeding, and has no right to appeal from the order of the Corporation Commission made herein.

"2. That the city of Charlotte is not affected by the order of the Corporation Commission made herein, and under the statute has no right to appeal from said order.

"3. That the only exception and assignment of error property taken and made by said city of Charlotte to the order of the Corporation Commission herein is the exception and assignment of error based upon the alleged contract between the city of Charlotte and the predecessor in title of the Southern Public Utilities Company, and said exception and assignment of error appear upon the face of the record herein not to be valid.

"Wherefore, the Southern Public Utilities Company prays this Honorable Court that the appeal of the city of Charlotte herein be dismissed.

CANSLER & CANSLER,
OSBORNE, COCKE & ROBINSON,
Attorneys for the Southern Public Utilities Co."

The city of Charlotte moved that the contract between the Charlotte Street Railway Company and the city of Charlotte, dated 29 September, 1886, be held valid and binding between the city of Charlotte and the Southern Public Utilities Company, successor to the Charlotte Street Railway Company, and enforcible notwithstanding the order of the Corporation Commission made herein, and that the Southern Public Utilities Company be forbidden and enjoined from charging and collecting in excess of five (5) cents for one continuous ride on its street railway lines within the city of Charlotte.

It was admitted that the Southern Public Company is the successor to the Charlotte Street Railway Company; the Charlotte Electric Railway Company having succeeded the Charlotte Street Railway Company, and the Southern Public Utilities Company having succeeded the Charlotte Electric Railway Company.

Testimony was introduced by the city of Charlotte to the effect that during the ten (10) years following the date of the contract between the Charlotte Street Railway Company and the city of Charlotte, to wit, the contract of 29 September, 1886, said street railway company paid no taxes to the city of Charlotte; that since the expiration of said ten-year period, said street railway company and its successors have paid to the city of Charlotte *ad valorem* property taxes, which have been regularly assessed against the property of said street railway company and its successors, and also license taxes annually charged and collected by the city of Charlotte without reference to any limitation.

By consent, the court took the case under advisement and at March term entered judgment in effect:

1. That respondent had the right to prosecute the appeal.

2. That the contract with the city must be subordinated to the orders of the Corporation Commission, paying just and reasonable rates in pursuance of law, and subject to the record on appeal to the Superior Court. And further, that the cause be referred to Mr. U. L. Spence to hear such evidence, and take such accounts as may be necessary, and make report to the court as early as practicable, whether the measure of rates allowed by the commission were reasonable, just, etc.

From this judgment the Southern Public Utilities Company, having duly excepted, appealed, assigning error as follows:

"2. For that his Honor erred in refusing to sustain the motion of the Southern Public Utilities Company based upon the entire record in this proceeding, consisting of the record as certified from the Corporation Commission, and the record of the proceedings in the Superior Court (except the final conclusion contained in his Honor's findings of fact and judgment entered 5 April, 1919) to dismiss the appeal of the city of Charlotte.

"3. For that his Honor erred in signing the judgment rendered in this proceeding."

The city of Charlotte also excepted and appealed, assigning error as follows:

"For that his Honor erred in refusing to hold, as a matter of law, and to render judgment in this proceeding, that the contract of 29 September, 1886, entered into between the city of Charlotte and the Charlotte Street Railway Company, predecessor of the Southern Public Utilities

Company, is valid and binding between the parties hereto, and still enforcible notwithstanding the order of the Corporation Commission made herein, and to forbid and enjoin the Southern Public Utilities Company from charging and collecting a fare in excess of five (5) cents for one continuous ride on its street railway lines in the city of Charlotte.

"2. For that his Honor erred in refusing to restrain the Southern Public Utilities Company from collecting a local fare in excess of five (5) cents pending the further hearing of this cause.

"3. For that his Honor erred in refusing to make an order requiring the Southern Public Utilities Company to issue receipts to all persons paying a seven (7) cent fare pending the further hearing of this cause.

"4. For that his Honor erred in signing the judgment rendered in this proceeding."

Appeal of the city of Charlotte, respondent.

Pharr, Bell & Sparrow for city of Charlotte.

Cansler & Cansler and Osborne, Cocke & Robinson for Utilities Company.

HOKE, J., after stating the case: The power of the Legislature, either directly or through appropriate governmental agencies, to establish reasonable regulations for public-service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved with us in well considered decisions dealing directly with the question. *R. R. v. Goldsboro,* 155 N. C., affirmed on writ of error to Supreme Court of United States, 232 U. S., 548-558; *Corporation Commission v. R. R.,* 140 N. C., 239; *Corporation Commission v. R. R.,* 137 N. C., 1. Having devoted their property to the public use, and operating under a legislative charter, usually conferring the right of eminent domain, they are in a peculiar sense subject to the police power, said by *Associate Justice McKenna,* in *Mutual Loan Co. v. Martell,* 222 U. S., 225, to be but another name for the power of government, and where this has been properly exerted in reference to these companies, the proprietary rights of individual ownership must, to that extent, be subordinated to the public welfare. In *Thomas v. Sanderlin,* 173 N. C., at page 331, the Court referred to this principle as follows: "It has been properly said that no satisfactory definition of police power can be given for, as our civilization becomes more advanced and complex, the extent and inclusive character of this power is being more and more illustrated, and, in the later decisions, has been held to embrace not only governmental regulations appertaining to the good order, health, and morals of the community, but also such as are considered promotive of the economic welfare and public convenience and comfort."

The opinion then quotes with approval from 6 Ruling Case Law, 193, as follows: "All property within the jurisdiction of a State, however unqualified may be the title of the owner, is held on the implied condition or obligation that it shall not be injurious to the equal rights of others to the use and benefit of their own property. In other words, all property is held subject to the general police power of the State so to regulate and control its use in a proper case as to secure the general safety, the public welfare, and the peace, good order, and morals of the community. Accordingly, it is a fundamental principle of the constitutional system of the United States that rights of property, like all other social and conventional rights, are subject to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient. And to these ends the Legislature, under its police power, may pass laws regulating the acquisition, enjoyment, and disposition of property, even though in some respects these may operate as a restraint on individual freedom or the use of property. The subordination of property rights to the just exercise of the police power has been said to be as complete as is the subjection of these rights to the proper exercise of the taxing power; and it is held that this implied condition is quite irrespective of the source or character of the title. This principle is in effect an application of the maxim which underlies the police power, *sic utere tuo ut alienum non laedas,*" citing in support of the statement *Chicago and Alton Railroad v. Tranberger,* 238 U. S., 67; *R. R. v. Goldsboro,* 232 U. S., 548-558, and other cases.

In *R. R. v. Goldsboro, supra, Associate Justice Whitney,* for the Court, said: "For it is settled that neither the contract clause nor the due process has the effect of overruling the police power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise."

In view of this power, and for its primary exercise, our General Assembly, chiefly in Rev., ch. 20, and amendments thereto, have created a Corporation Commission, given it general supervision over the railways, street railways, and like companies of the State, and empowered it to fix such rates, charges, and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses and other specified matters pertinent to such an inquiry. The statute further provides that "any party affected by the decisions and determinations of the commission

may appeal"; that the rates as fixed by the commission shall stand pending an appeal, and "until they are changed, revised, or modified by the judgment of the Superior Court on such appeal, and that when approved and confirmed by the court, they shall remain the established rates until the same shall be changed, revised, or modified by a final judgment of the Supreme Court, if there shall be an appeal, and until changed by the Corporation Commission.

Both from the language of the statute and its evident meaning and purpose, this power to fix rates that are just and reasonable extends to an increase as well as a lowering of rates, and, in making decision on these questions, it is clearly contemplated and provided that the commission shall establish such rates and charges as will give to the owners a fair return for their investment and enable them to keep their property and equipment in condition to afford adequate, safe, and convenient service.

Under and by virtue of this Legislative authority and in the exercise of the power referred to, the commission in this instance, on notice given, have had an investigation, and, in their best judgment, have allowed the increase applied for by the petitioners, and, under the express provisions of the statute that are to be considered, the just and reasonable charges for the services rendered unless and until they shall be changed or modified on appeal, or the further action of the commission itself, and under the principle illustrated and approved in the cases cited, and others of like kind, we must affirm the ruling of his Honor that any contract that the city of Charlotte may have for a lower rate must yield to the public interest and requirement as expressed in this authoritative judgment of the commission.

Not only is the judgment of his Honor sustained by the principle more directly involved, but any other ruling in its practical application would likely and almost necessarily offend against the principle which forbids discrimination on the part of these companies towards patrons in like condition and circumstance. If a *quasi*-public company of this kind could evade or escape regulation establishing fixed rates that are found to be reasonable and just by making long-time contracts or other, this regulation might be made to operate in furtherance of the very evil it is in part designed to prevent.

Accordingly, it has been very insistently held, in case of railroads, that the rates established by the Interstate Commerce Commission and published pursuant to their order shall always prevail as the charges for transportation notwithstanding any special contract for lower rates made by the parties. *Texas Pacific v. Mugg, etc.*, 202 U. S., 242, and many other cases.

A principle approved and applied by the Court in reference to intrastate transportation in *Latham v. R. R.,* 176 U. S., 417, and *Edenton Cotton Mills v. R. R.,* at present term, 100 S. E., 341.

And in the recent case of *Union Dry Goods Co. v. Gas Public Service Corporation,* 145 Ga., 658, it was held that where the State Railroad Commission, having cognizance of the matter, had fixed upon reasonable rates to be charged by a public-service company supplying electricity to the inhabitants of a city which superseded lower rates agreed on in an existent long-time contract made previously between the company and the consumer, this was a valid exercise of the police power, not impairing the obligation of the contract or depriving the consumer of his property without due process. This case, which seems a direct authority on the question presented, was affirmed on writ of error by the Supreme Court of the United States, 248 U. S., 372. And *Associate Justice Clarke,* in delivering the opinion, quotes in support of the position, *Manigault v. Springs,* 199 U. S., 473-80: "It is the settled law of the Court that the interdiction of statutes impairing the obligation of contracts, does not prevent the State from properly exercising such powers as are vested in it for the promotion of the common weal or are necessary for the general good of the public through contracts previously entered into between individuals may be thereby affected."

And again, from *L. & N. R. R. Co. v. Motley,* 219 U. S., 467-82, where the Court quotes with approval from *Knox v. Lee,* 12 Wallace, 450-51: "That contracts must be understood to be made in reference to the possible exercise of the rightful authorities of the Government, and no obligation of the contract can defeat the legitimate Government authority." It may be noted that this was a decision subordinating to the police power the contract rights of an individual, and all the more will the principle operate when these rights are held by a municipality, which, in the main and on governmental matters, are but governmental agencies of the State, and, as such, subject to almost unlimited legislative control, except when restricted by constitutional provision. *Board of Trustees v. Webb,* 155 N. C., 379; *Jones v. Comrs.,* 137 N. C., 579-596; *New Orleans v. New Orleans Water Works,* 142 U. S., 79; *Wildwood v. Public Utilities Co.,* 88 N. J. L., 81.

We are inclined to the opinion, as contended for by the petitioner, that the provision in the contract restricting the company to a charge of 5 cents per passenger expired at the end of the 10-year period, the courts leaning against a construction that would make a contract of this character indefinite as to duration. *Soloman v. Sewerage Co.,* 142 N. C., 439.

Nor are we inadvertent to the position also taken by the petitioner that the contract is void as in contravention of our constitutional provi-

sions requiring that taxation shall be uniform and *ad valorem.* In one aspect of the agreement, and the evidence pertinent, it may be that the case presented is at most merely one of *ultra vires* and that the petitioner or its predecessor in title, having received the stipulated consideration, is not in a position to question its corresponding obligation. See *So. Pac. Co. v. City of Portland,* 227 U. S., 559; *Ry. v. McCarty,* 96 U. S., 258; *Chicago Ry. v. Chicago,* 176 Ill., 188. Without definite ruling on either of these suggestions, however, we prefer to rest our decision on the ground taken by his Honor in the court below, that whatever may have been the rights of the city under and by virtue of the alleged contract, they were taken and held subject to the orders of the Corporation Commission, made in the reasonable exercise of the police power of the State, conferred upon that body by act of the General Assembly, and subject to be revised on appeal to the Superior Court, and thence to the Supreme Court, under the express provisions of the statute, Rev., 1074-1079, *et seq.*

The cases to which we are cited by respondent are in the main where one of the parties to the contract has of its own motion undertaken to justify a departure from its terms and are not authority on the question presented here. See *Columbus Power and Light Co. v. The City of Columbus,* 249 U. S., Current Reporter, 15 May, 349.

We find no error in respondent's appeal, and the judgment is

Affirmed.

Appeal of the Southern Public Utilities Company, petitioner.

HOKE, J. The petitioner appeals from the ruling of the court denying the motion to dismiss made on the ground that the city of Charlotte had no such interest in the controversy as to justify and maintain its appeal, but we are of opinion that on the record and facts in evidence this position cannot be sustained. Not only was the city of Charlotte made a party and recognized as such by the Corporation Commission, but the Charlotte Street Railway Company, the predecessor in title of the petitioner, and under whose charter, so far as the record discloses, this appellant is now maintaining and operating its street railway in the city, has also recognized an interest in the city, and given it a status in the question and litigation concerning it. Holding, or making a reasonable and *bona fide* claim to hold, rights under this contract, it must be allowed to have them considered and determined, both before the Corporation Commission and the Superior or Supreme Court, on appeal, as the statute provides. In addition, the question being one of public interest and of concern to each and all of its inhabitants, it was both the right and duty of the city to represent its people, assuredly so since the

statute conferring on town and city governments the power to grant franchises of this character, "upon reasonable terms for periods not to exceed 60 years." Rev., 2916 (6), ch. 73.

Under this statute, at the time of these proceedings instituted and hearing had, the city government having jurisdiction over the subject-matter, it was both its right and in the line of its official duty to make contracts and maintain such litigation concerning it as was reasonably necessary to conserve the rights of its people and make its jurisdiction effective and the well considered decisions hold that judgment rendered in such litigations will bind the individual citizen.

This position was approved with us as to counties in *Bear v. Comrs.*, 122 N. C., 434, and as to cities and towns in *Hickory v. R. R.*, 141 N. C., 716, it being held in this last case that "a municipality is a proper party to institute an action to prevent a public nuisance by the proposed enlargement of a freight depot in the city." And authoritative cases elsewhere, and text-books of approved excellence, are in support of the position. *People v. Holladay*, 93 Cal., 241; *Trustees v. Cowen*, 4 Paige, 570; *Gas Co. v. City of Mincie*, 160 Ind., 97; 19 R. C. L., title "Municipal Corporations," secs. 345, 427, 433. In this citation to R. C. L., sec. 345, it is said, among other things:

"That a municipal corporation is, in the eye of the law, the legal representative of its inhabitants and taxpayers with respect to all matters properly within its jurisdiction. . . . A municipal corporation is the proper representative of the equitable rights of its inhabitants to the use of a public square, and is authorized to file a bill in equity to prevent the erection of a nuisance thereon."

A judgment against a municipal corporation in a matter of general interest to all of the citizens is binding on the latter, though not parties to the suit, "and every taxpayer is a real, though not a nominal, party to such judgment and cannot relitigate issues which were litigated in the original action against the county or its legal representatives, and if the county board fails to avail itself of legal defenses the people are concluded by the judgment." And in section 427: "When a municipal corporation has the power to grant or refuse, in its discretion, permission to a public-service company to occupy the streets with its structure, whether such permission be called a franchise, a license, a permit, or merely designation of the streets to be occupied, it may grant such permission subject to such terms as it sees fit to impose, provided only they are not against public policy or in derogation of any right the company may have under its franchise from the State. Both under its contract, therefore, and as the representative of its inhabitants in a matter of public concern coming under its supervision, we are of opinion that the city had a right to appear in this litigation and to prosecute the appeal

in protection of its citizens, and as clearly provided by the statute. The decisions cited to the contrary are really in affirmance of the principle, for, so far as examined, they were made for the reason that the question presented was only a matter of individual interest or affected only a restricted portion of the population. This disposes of the only exception which the petitioner has seen fit to make on his appeal, but as it has been suggested that the respondent has not raised the question as to the reasonableness of the proposed increase of rates, but chosen to rely on the effect of its contract, we deem it not amiss to say that this position in our view does not correctly interpret the record. On the contrary, it is disclosed that at the principal hearing there were no formal pleadings filed, but the respondent appeared and by cross-examination of the president of the company, the only oral testimony presented during the investigation, the city, by its counsel, endeavored to show that the proposed rates were unreasonable and unjustified by the facts and conditions presented, and no mention of contract was then made. Five days later the contract was offered by the city, and its answer formally filed, alleging in effect that the increase was unreasonable, and setting up said contract also as a further and sufficient answer. When the order was made allowing the increase, the city filed formal exceptions and assignments of error, six of which were addressed to the unreasonableness of the rates and the valuation and methods by which it was sought to uphold them, and one, No. 7, referring to the contract.

When the cause was called for hearing on appeal in the Superior Court, the case was heard on the record, and the exceptions in behalf of the respondent clearly presented its objections to the order, both on the grounds that the rates were unreasonable and that the increase was absolutely inhibited by the terms of the contract held by the city. True, in the case on appeal it is stated that the city of Charlotte moved for judgment that the said contract be held valid and binding, and that the Southern Public Utilities Company be forbidden and enjoined from charging and collecting fares in excess of five cents, making no reference otherwise to the proposed increase of rates, but this was because the city was insisting upon the effect of its contract as a plea in bar of the reference, and it has a right to test that position on appeal. *Jones v. Wooten,* 137 N. C., 421. The respondent there made no further reference to the reasonableness of the rates because that question was resolved in its favor, and fully recognized by the judgment of the lower court. If there had been a difference between the case on appeal and the facts disclosed in the record, the record would control, but, as a matter of fact, there is no inconsistency between the two, and a correct interpretation will disclose that the position of the respondent has been maintained throughout. First, that the proposed change of rates was absolutely

forbidden by the contract, and if this were not true, that the increase was unreasonable and unjustified by the facts and conditions presented, and on the record we must affirm the judgment of his Honor below in its entirety, and hold that there has been no error committed to the prejudice of the petitioner's rights.

The case of *Corporation Commission v. R. R.*, 170 N. C., 560, cited and very much relied upon by appellant, is not an authoritative decision in support of its position. In that case the Corporation Commission, after a full and fair investigation, had fixed upon the location of a railroad station in the town of Ansonville, N. C., and from their order in the case one or more of the citizens of the town, who appeared as parties to the proceedings, excepted and appealed. The Superior Court entered judgment dismissing the appeal, and, on appeal to this Court, the judgment was affirmed, two of the Justices being of opinion that, on a purely administrative measure of that kind an individual citizen of the town had no such interest in the controversy as entitled him to an appeal, an opinion was written in expression of that view. The present writer also wrote an opinion concurring in the disposition made of the appeal, but, on the ground that as the entire facts, which were made a part of the record, showed that the question had been fully investigated and fairly determined by the commission, it would be an idle thing to entertain the appeal and then affirm the judgment on the merits. *Associate Justice Allen* concurred in the result without further expression of his position, and the *Chief Justice* dissented, being of opinion that an appeal would lie. So that, even on the facts of that record, a majority of the Court have not expressed agreement as to the interest required for the maintenance of an appeal in these cases. And I think I may safely say that none of the Court entertain the view that the right of appeal in such cases is necessarily restricted to the State, and a defendant corporation, whose interests are adversely affected, but, as held in the subsequent case of *R. R. v. R. R.*, 173 N. C., 413, any one appearing as a party, whether as petitioner or respondent, plaintiff or defendant, having a proper interest in the controversy, may appeal from an order which affects such interests adversely.

In the present case, as we have endeavored to show, the city of Charlotte has such an interest, and the judgment of his Honor allowing it to prosecute the appeal is

Affirmed.

CHARLES A. MOORE v. THOMAS J. HARKINS, ADMINISTRATOR OF H. S. HARKINS.

(Filed 27 December, 1919.)

1. Judgments—Estoppel—Pleadings—Scope of Inquiry.

A final judgment of a court having jurisdiction of the cause and of the parties estops the parties as to all issuable matters embraced by the pleadings that are material and relevant irrespective of whether they have been presented in the course of the trial; and where a deputy United States Marshal has assigned his fees and expenses as such to another, with order on the U. S. Marshal to pay them, and it has been theretofore adjudicated by final judgment, that a recovery may not be had against the deputy marshal, the purchaser will be estopped from again prosecuting his action, whether he sues to recover upon the writing or the moneys he has paid in the transaction.

2. Courts— Equity— Actions at Law— Jurisdiction—Injunctions—Judgments—Bills of Peace—Multiplicity of Suits.

In this State, wherein the difference between actions at law and suits in equity has been abolished, equitable relief may be enforced in an action in which the remedy at law has been sought; and, in proper instances, an injunction, as if in a suit in the nature of a bill of peace, may be decreed by the court to prevent vexatious litigation, or further action, upon a cause in which the party has theretofore been estopped by final judgment.

CIVIL ACTION, heard before *Ray, J.*, at June Term, 1919, of BUNCOMBE. Judgment in favor of the defendant, from which plaintiff appealed.

Craig & Craig and J. P. Kitchin for plaintiff.
Kingsland Van Winkle for defendant.

BROWN, J. This action was heard upon the pleadings, records, and exhibits. The complaint, filed May Term, 1919, states that the deceased, H. S. Harkins, as deputy marshal of the United States, gave to the said Moore, for value received, drafts under his seal upon Robert M. Douglas, United States Marshal, as the deputy of the said Douglas, in the following words and figures:

"For value received, I hereby assign, transfer, and set over to Chas. A. Moore all dues to me as Deputy United States Marshal from the Government, and Robert M. Douglas, U. S. Marshal for the Western District of North Carolina, on account of actual expenses, fees, and allowances as Deputy United States Marshal, and I direct the same to be paid to the order of the said Chas. A. Moore all that is due to this date. This 8 November, 1879. H. S. HARKINS. (Seal.)"

"For value received, I hereby assign, transfer, and set over to Chas. A. Moore all dues to me as Deputy United States Marshal from the Government, and Robert M. Douglas, U. S. Marshal for the Western District of North Carolina, on account of actual expenses, fees, and allowances as Deputy United States Marshal, and I direct the same to be paid to the order of the said Chas. A. Moore all that is due me from the first of January, 1880, up to the 18th of February, A.D. 1880.

H. S. HARKINS. (Seal.)"

The complaint alleges that the plaintiff paid to the said Harkins the sum of $1,200 for said drafts on 16 February, 1880. The complaint also sets up a cause of action for $120.10 for an account against Robert M. Douglass, Marshal, alleged to have been purchased on 6 December, 1880, from H. S. Harkins. Which said account was duly presented to R. M. Douglas, Marshal, and has never been paid. The complaint further alleges that these assignments and account were properly presented to the said Douglas, and were not paid, the said Harkins having no funds in the hands of said Douglas at the time. The defendant pleads the statute of limitations and an estoppel of record by former judgment rendered.

The plaintiff contends that the court erred in refusing to submit the issues to a jury. We are unable to see that there were any issues of fact required to be submitted to a jury, as the estoppel pleaded was a matter of record, the authenticity of which was not disputed. The identical cause was before this Court in a case between the same parties at Spring Term, 1916, and is reported 171 N. C., 697. A copy of the paper sued on is therein set out.

In that case it was held that the right of action had not accrued to the plaintiff, as the plaintiff stated that the drafts were not to be paid until Douglas got the money from the Government. That action was therefore dismissed.

Another action was brought by plaintiff on 5 November, 1914, and tried before *Harding, J.*, February Term, 1916, in which a judgment of nonsuit was entered, the cause of action being based upon the same drafts or assignments.

Another action was brought on 24 February, 1917, based upon the same cause of action, and also upon the account for $120.10. This action was tried April Term, 1918, before his Honor, *Judge Stacy,* upon the following issues:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: 'No.'

"2. Is the plaintiff's claim barred by the statute of limitations? Answer: 'No.'"

The court set aside the verdict of the jury as to the second issue, and ordered judgment against the plaintiff upon the first issue.

His Honor charged the jury, after stating the evidence and contentions of the parties, as follows:

"If you find as a fact, and are satisfied by the greater weight of the evidence, that these drafts were given to the plaintiff for value, and that they have not been paid, and they are now due, I charge you it would be your duty to answer the first issue 'Yes, and in the sum of $1,400, with interest from 18 February, 1880'; but if you do not find that these drafts were given for value, it would be your duty to answer the first issue 'No.'"

An appeal was taken to this Court, and appears in 177 N. C., 113. In closing its opinion the Court said: "We think the charge on the first issue was correct and practically reduced the controversy to one of fact, which has been settled by the jury's findings on the first issue."

It is immaterial upon what ground the plaintiff's right to recover may be based; whether as an action upon the drafts, or to recover the money back paid for them, the controversy comes within the scope of the issue, and the finding of the jury and the judgment of the court effectually bars another action. It is well settled that when a court has jurisdiction of a cause and of the parties, and renders a final judgment therein, it estops the parties as to all issuable matter set out in the pleadings. It also concludes the parties as to all matters within the scope of the pleadings which are material and relevant. *Coletrain v. Laughlin,* 157 N. C., 282; *Ferrebee v. Sawyer,* 167 N. C., 203.

A judgment estops not only as to every ground of recovery presented in the action, but also as to every ground which might have been presented. *Cromwell v. Sac,* 94 U. S., 35.

In *Wagon Co. v. Byrd,* 119 N. C., 463, it is said: "The principles governing estoppels by judgment are established by a long line of decisions in this and other States, and we have no desire to take a new departure which will shake the long-settled law as to *res judicata.* This rule is thus stated in 1 Herman Estoppel, sec. 122, and is fortified by a long list of leading authorities there cited: 'The judgment or decree of a court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided. . . . This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive. It might tend to unsettle all the determinations of law and open a door for infinite vexation. The rule is founded on sound principle.' And the same

authority, sec. 123, says: 'The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject in litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.'"

It is immaterial whether this is an action to recover upon the drafts or to recover back the money paid for them, the plaintiff is barred by the verdict and the judgment rendered in the trial before his Honor, *Judge Stacy,* and affirmed by this Court.

The plaintiff excepts to the injunction granted by his Honor, *Judge Ray,* to prevent further litigation.

We are of opinion that the action of his Honor in enjoining the plaintiff from prosecuting further actions on the same cause of action was warranted by the facts. The remedy of a bill of peace to prevent vexatious litigation was well known at the common law. As a rule the remedy has not been sought very often in this State, but the right to ask for it is well established, and it may be invoked in the pending action, and a new action for that purpose is not necessary under our method of procedure. *Featherstone v. Carr,* 132 N. C., 800.

At common law the remedy was affirmed by a bill in equity enjoining the plaintiff from proceeding in the law courts. One of the earliest cases in which a bill of peace was sought is reported in *Selden's cases,* in Chancery, 18. In this State the distinctions between law and equity procedure have been abolished, but the principles of both remain, and equitable relief may be sought in the same action in which the demand at law is sought to be enforced.

Upon all the authorities we must conclude that the plaintiff is barred by the previous adjudications of the Superior Court, and affirmed by this Court from, the prosecution of this action.

Affirmed.

DECIDED WITHOUT OPINIONS

Canupp v. Cotton Mills, Rockingham. Affirmed. (No. 357.)
Clark v. Sweaney, Durham. Affirmed. (No. 328.)
Cool Springs Corp. v. Capehart, Chowan. Affirmed. (No. 10.)
Croom v. Whitehead, Craven. Affirmed. (No. 175.)
Everton v. East Carolina Lumber Co., Tyrrell. Court being evenly divided in opinion (*Brown, J.*, not sitting), judgment stands affirmed. (No. 17.)
Fix v. N. C. R. R. Co., Alamance. Affirmed. (No. 324.)
Frost v. Harrell, Currituck. Affirmed. (No. 25.)
G. B. C. Mfg. Co. v. Allen, Montgomery. Affirmed. (No. 484.)
Huffines v. So. Ry., Rockingham. Affirmed. (No. 353.)
Hurst v. A. C. L. R. R. Co., Onslow. Affirmed. (No. 218.)
Jordan v. Norfolk-Southern R. R. Co., Chowan. Court being evenly divided in opinion (*Brown, J.*, not sitting), judgment stands affirmed. (No. 11.)
Knight v. Winslow, Edgecombe. Affirmed. (No. 63.)
Marks v. McLeod, Lee. Court being evenly divided in opinion (*Brown, J.*, not sitting), judgment stands affirmed. (No. 109.)
Middleton v. Horse & Mule Co., Duplin. Affirmed. (No. 225.)
Newkirk v. Highsmith, Duplin. Affirmed. (No. 231.)
Ohio Trust Co. v. Furgerson, Halifax. Affirmed. (No. 110.)
Pierce v. Winders, Duplin. Affirmed. (No. 227.)
Raney v. Smith, Wayne. Affirmed. (No. 114.)
Rapport v. Director General., So. Ry., etc., Durham. Affirmed. (No. 330.)
Spruill v. Smallwood, Bertie. Affirmed. (No. 105.)
State v. Daniel, Davidson. Affirmed. (No. 479.)
State v. Latta, Durham. Affirmed. (No. 313.)
Strickland v. West, Sampson. Affirmed. (No. 230.)
Swift & Co. v. Meekins and Produce Co., Pasquotank. Court being evenly divided in opinion (*Brown, J.*, not sitting), judgment stands affirmed. (No. 32.)
Swift v. New Bern, Pasquotank. Affirmed. (No. 23.)
Tillotson v. Currin, Granville. Petition to rehear dismissed. (No. 321.)
Watson v. Heckstall, Bertie. Affirmed. (No. 108.)

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1920

SWIFT & CO. v. ISAAC MEEKINS ET AL.

(Filed 18 February, 1920.)

Vendor and Purchaser—Contracts—Warranty—Breach—Damages—Fertilizer.

It is not required that the language used by the principal or his authorized agent in the sale of goods should have been intentionally false, or made for the purpose to deceive, in order to constitute a warranty as a matter of law, on the breach of which the purchaser may recover damages; for it is sufficient if the representation by the vendor is that the articles sold possessed a certain value and certain qualities, as, in the sale of fertilizer, that it was as good as any on the market with the same analysis, and as good as any sold having the same analysis for the making of cotton and corn, the declared purpose for which it was intended, and accordingly purchased.

CIVIL ACTION, tried before *Devin, J.*, at January Term, 1919, of PASQUOTANK.

The following issues were submitted:

"1. Is the defendant, I. M. Meekins, indebted to the plaintiff as alleged in the complaint, if so, in what sum? Answer: '$1,477.38, and interest from 15 July, 1917.'

"2. Did the plaintiff warrant the goods sold to defendant Meekins, as alleged in the answer? Answer: 'No.'

"3. Was there a breach of warranty by the plaintiff, as alleged in the answer? Answer: 'No.'"

From the judgment rendered the defendant appealed.

W. A. Worth and Thompson & Wilson for plaintiff.

Aydlett & Sawyer, Ehringhaus & Small, and P. W. McMullan for defendant.

BROWN, J. The plaintiff sued to recover on a note of the defendant given for the purchase of fertilizer. The defendant admitted the execution of the note, and his indebtedness thereupon, as alleged in the complaint, subject to his counterclaim, as set out in the answer, for breach of warranty as to the quality of said fertilizer, made at the time of the sale.

The contract was made in January, 1919. Plaintiff agreed to sell and deliver to the defendant 40 tons of fertilizer analyzing 5-7-0 and 10 tons of acid phosphate.

The defendant testified that he had never used plaintiff's fertilizer, and so stated to LeRoy, the agent who sold it to him. LeRoy testified: "I told him it was as good fertilizer as there was on the market. I told him it was as good fertilizer as there was on the market of the same analysis. He told me he was buying it for cotton and corn, and I told him it was as good as any sold to be used for cotton and corn, of the same analysis. I told him it was as good as anybody else's fertilizer of the same analysis. I told him that I sold this fertilizer cheaper than anybody else. I told him that Swift & Company's goods were as good as any from any other factory."

The defendant Meekins testified that the agent told him that the fertilizer was as good as any one could get, and that Swift & Company could sell it cheaper on account of their output from their packing house, and that he told the agent if it was all right that he would take it.

The judge submitted the question of warranty to the jury. The defendant contends that there was a warranty as a matter of law upon LeRoy's testimony, who was the agent of the plaintiff, and introduced by him, and that the judge should have so held and instructed the jury accordingly.

We agree with the defendant that the language used by the agent constituted a warranty in law. It is not necessary that the language should be intentionally false, or that there should have been any purpose to deceive. The positive representation by a vendor that the article sold possesses a certain value and certain qualities, amounts to a warranty, and by counterclaim the defendant may set up the breach of the warranty and reduce the sum claimed by the difference between the contract price and the actual value, although there was no deceit in the sale.

McKinnon v. McIntosh, 98 N. C., 89. This case is very much on all fours with the one under consideration. In *Reiger v. Worth*, 130 N. C., 268, it was held that representations that rice is excellent seed rice

amounts to a warranty. In that case the Court held also that his Honor correctly instructed the jury as a matter of law that the defendant's representations amounted to a warranty, and that they should answer that issue "Yes." See, also, *Love v. Miller,* 104 N. C., 582; *Lewis v. Rountree,* 78 N. C., 323.

We are of opinion that the judge should have instructed the jury as a matter of law, that the language used by the plaintiff's agent amounted to warranty, and that they should answer the second issue "Yes."

For this error there must be a

New trial.

S. H. SPENCER v. A. V. WILLS ET AL.

(Filed 18 February, 1920.)

1. Drainage Districts—Governmental Agencies—Quasi-Public Corporations—Principal and Agent—Negligence—Torts.

Drainage districts formed under the statute are not regarded as governmental agencies to the extent that they are protected from civil actions except when authorized by statute, but are classed with *quasi*-public corporations and are ordinarily liable for their torts and wrongs, which, in proper instances, extend to their participating officers and agents as a personal liability.

2. Same—Procedure—Unauthorized Departure.

The principles that conclude parties to proceedings in the formation of drainage districts under the statute by final judgment, from a recovery of damages to their lands, applies to such as may have accrued in the laying out and the establishment of the district under the procedure prescribed, and does not prevent an injured proprietor, within or without the district, from maintaining his independent action to recover damages caused by an unauthorized and substantial departure from the scheme and plain established by the decrees and orders in the cause, nor where the damage complained of is attributable to the negligence of the company, or its officers or agents in carrying out the proposed work.

3. Same—Judgments—Estoppel—Actions.

In an action against a contractor in cutting canals and doing other work in the establishment of a drainage district under the statute, there was evidence tending to show that the defendant caused damage to plaintiff's land, situated within the district, by the negligent construction of a spillway for the water, not called for in the plans and specifications, from a canal, called for therein: Held, the plaintiff, though a party to the proceedings, was not concluded by the final judgment therein, from recovering his damages in an independent action.

CIVIL ACTION, tried before *Lyon, J.,* and a jury, at October Term, 1919, of HYDE.

The action is to recover damages for alleged negligence of defendant in cutting a spillway in the side of canal whereby a large amount of water was thrown in and upon the lands of plaintiff, causing substantial injury to said land. There was denial of liability by defendant, and, on issues submitted, the jury rendered the following verdict:

"1. Were the plaintiffs' lands and crops damaged by reason of the negligent construction of the spillway by the defendants, as alleged? Answer: 'Yes.'

"2. What damage has the plaintiffs sustained to their crops of 1915? Answer: '$241.'

"3. What permanent damage has the plaintiff sustained to lands? Answer: '$1,100.'

"4. Are the plaintiffs estopped in this action? Answer: 'No'—answered by the court."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Thos. S. Long, Spencer & Spencer, and Daniel & Carter for plaintiff.
H. G. Connor, Jr., for defendant.

HOKE, J. There are facts in evidence on the part of plaintiff tending to show that Mattamuskeet Drainage District has been established pursuant to the statutes regulating the subject, Laws 1909, ch. 509 and ch. 442, and amendments thereto, and in 1915 defendants, as contractors under the authorities of said district, were engaged in cutting East Main Canal, leading from the lake to East Swamp, a distance of a mile or more, plaintiff being a resident of the district and his land lying just south of the canal. That the work was being done with a floating dredge, which operated in the canal, and requiring from 4 to 5 feet of water therein to make it work properly; that after the defendants had cut through plaintiff's land and some distance towards the swamp, a dam was built in the canal between the dredge and the lake in order to hold the necessary amount of water, and the work having proceeded to the boundary, and on to the East Swamp, owing to the excessive rainfall at the time the canal was flooded with too much water, and it became necessary to relieve the pressure by letting out a portion of the water; that, to do this, a spillway was cut in the side of canal, above the dam, 4 to 5 feet wide and 18 inches to 2 feet deep, and extended by a ditch two to three hundred feet into lands of plaintiff as far as a certain road thereon, known as Quaker Road; that this ditch, an extension of the spillway, at some little distance from the canal, cut through a ridge or elevation that had afforded some protection to the arable portion of plaintiff's land, and was stopped at the road without any outlet, and,

through said spillway and drain, large quantities of water from East Swamp and adjacent territory was thrown in and upon plaintiff's lands, destroying the crops for the current year, souring the land, both cultivated and woodland, so as to cause substantial and permanent damage to same. It was further in evidence, both from witnesses of plaintiff and the defense, that the water flowing out of the spillway, with 10 or 11 hours work by proper ditches, could have been carried back into the canal below the dam, and thus prevented from affecting plaintiff's land to any appreciable extent. There was evidence on part of defendant tending to show that the water let out of this spillway could not have injured plaintiff's land, but the damaged complained of was caused by the excessive rains upon said land, and the rise of waters in the lake so that plaintiff's land was deprived of its usual and proper drainage. It was further shown that while this spillway was no part of the plan of drainage, as set forth in the surveys, plats, etc., it was made to relieve the canal of the excess of water, with the knowledge and approval of commissioners; that defendants intended to cut a spillway for the purpose indicated, and these commissioners had afterwards accepted this canal and other dependent portions of the work without objection as to the way the canal had been relieved.

Upon this, the evidence chiefly relevant and sufficiently full to afford a proper apprehension of the questions presented, the jury, accepting plaintiff's version of the matter, has found that the plaintiff's lands were injured by reason of the negligent manner the spillway was constructed, and, on such finding, we are of opinion that his recovery for the damage suffered has been properly awarded. In *Sawyer v. Camden Run Drainage District,* a case at the present term, we have held that these districts, organized under our law applicable to the subject, are not to be considered as governmental agencies to the extent that they are protected from civil actions except where authorized by statute, but are more properly classed with railroads and other *quasi*-public corporations of like kind, and ordinarily liable for their torts and wrongs, citing *Leary v. Comrs.,* 172 N. C., 25, and other authorities. The *Leary case* holding further that, in proper instances, both the company and its participating officers and agents personally may be sued. It is contended for the defendants that the principles of the Leary decision, and others of like kind, do not apply here, because, in that case, the injured claimant was an outsider, whereas, in the present case, he is a party to the proceedings, and concluded by the orders and decrees in the case, and as to the work done pursuant to the same. In various decisions appertaining to the subject, we have held that parties to proceedings of this character and in reference to their lands situate within the district are estopped from questioning by independent suit the judgment establish-

ing the district or the validity and amount of the assessments made in the cause or the matter of burdens and benefits affecting the property. These, and other like rulings, must be challenged at the proper time and in the course of the proceedings, and unless objection is successfully maintained, the parties are concluded. *Craven v. Comrs.*, 176 N. C., 531; *Lumber Co. v. Comrs.*, 174 N. C., 647; *Griffin v. Comrs.*, 169 N. C., 642; *Newby v. Drainage District*, 163 N. C., 24; *Shelton v. White*, 163 N. C., 90.

But the principle does not apply nor operate to prevent an injured proprietor within or without the district from maintaining suit to recover for the damages done where there has been an unauthorized and substantial departure from the scheme and plan established by the decrees and orders in the cause, nor where the damage complained of is attributable to the negligence of the company or its officers or agents in carrying out the proposed work. It is impossible to anticipate or make adequate provision against damages arising from these sources, and they are not, therefore, usually considered as being within the scope and purview of the suit. Here, as in case of condemnation proceedings, the burdens and benefits are considered and passed upon, and the damages determined on the theory that the work shall be done substantially as planned, and with reasonable care, and, if there is breach of duty in these respects, causing damage, the injured proprietor can assert his claim by independent suit. Assuredly so, unless the law should make adequate provision therefor by appropriate proceedings in the cause. In *Lumber Co. v. Drainage Comrs.*, 174 N. C., 647, decided intimation is given that an action would lie by an injured proprietor within the district for damages caused by negligence in carrying out the work, and such right is directly upheld in *Bunting v. Drainage District*, 99 Neb., 843.

The correct doctrine on this subject is very well stated in the digest of that well considered decision by *Sedgwick, J.*, appearing in L. R. A., 1918 B, pp. 1004 and 1005, as follows:

"1. Local corporations, created by request or consent of the persons residing in the territory incorporated, and principally for their benefit, although they are clothed with powers of a public nature, are liable for damages caused by their negligence.

"2. A drainage district, organized and acting under Rev. Stat., 1913, Art. V, ch. 19, is liable for damages caused by its negligence in the construction of its works.

"3. Condemnation by right of eminent domain is not allowed except so far as it is necessary for the proper construction and use of the improvement for which it is taken.

"4. If the application for condemnation specifies the desired taking and use of certain real estate, and shows that it is necessary for the

improvement contemplated, all damages caused by such taking, properly exercised, will be included in the damages allowed in such proceedings, which will be a bar to any further claims for such damage.

"5. In such case damages caused by the negligent construction of the improvement are not contemplated in the condemnation proceedings, and are not barred thereby.

"6. Damages caused unnecessarily by negligent and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs."

The general principle has been approved and applied with us in actions for damages caused by change in the grade of streets. Ordinarily such damages are supposed to have been allowed for in the original dedication, but the position does not prevail as a protection against negligence in doing the work. *Harper v. Lenoir,* 152 N. C., 723, citing *Meares v. Wilmington,* 31 N. C., 73, and other cases, and so, in land condemned for railroad purposes, the damages naturally incident to the construction of the road, carried out according to the survey and plans, etc., are covered by the original award, but for injuries caused by negligence in construction or maintenance of such places recovery may be had. *Duval v. R. R.,* 161 N. C., 448, and cases cited.

We were referred by counsel to *McGillis v. Willis,* 39 Ill., App. 311, as a decision against plaintiff's right to recover in this instance, but, in our opinion, that case is not an authority for his position. In so far as it recognizes the principle that these drainage districts are governmental agents, and so protected from ordinary civil suits, the case is not, as we have seen, in accord with our own decisions on the subject, and, in that respect, it seems to be entirely inconsistent with subsequent decisions of the Illinois Court of Appeals, notably *Bradberry et al. v. Vandalia Levee and Drainage District,* 236 Ill., 36, and in which it is held, as here, that these drainage districts are but *quasi*-public corporations, and liable for their torts and wrongs at the suit of an injured proprietor. As a matter of fact, however, the contractors and officers and agents were relieved of liability in the case referred to because they were doing the work as planned, and in the necessary and proper manner, and no question of negligence was presented.

On careful consideration, we find no error in the record, and the judgment for plaintiff is affirmed.

No error.

NANCY E. WATERS v. HENRY C. BOYD AND IDA EVERETT.

(Filed 18 February, 1920.)

1. Controversy Without Action—Statutes—Affidavits—Actions.

It is required that the statute permitting the submission of a controversy without action state in the affidavit that "the controversy is real and the proceedings in good faith to determine the rights of the parties," and this statute being strictly construed, the statement that the controversy is genuine and submitted to determine the rights of the parties, is fatally insufficient.

2. Appeal and Error—In Forma Pauperis—Affidavit—Good Faith.

An appeal *in forma pauperis* to the supreme court may be dismissed when there is no averment in the affidavit that it was taken "in good faith."

3. Controversy Without Action—Affidavit—Cause of Action—Parties—Moot Questions—Actions.

Where the facts agreed in a controversy without action show no cause of action, an appeal from a judgment thereon will be dismissed in the supreme court, as where the plaintiff claims title under a deed, avers that her purchaser was prevented from accepting her deed by the claims of the defendants, without allegation of the facts and circumstances or setting forth sufficiently the terms of the deeds, or making her purchaser and other necessary parties, parties to her action, thus presenting a moot question which the court will not decide.

4. Controversy Without Action — Affidavits — Defects— Court— Amendments—Actions.

The submission of a controversy without action is a consent proceeding, and the court cannot therein direct additional necessary parties, or statement of facts to be made *in invitum*, to cure the defect.

APPEAL by plaintiff from *Bond, J.*, at September Term, 1919, of BEAUFORT.

J. D. Paul for plaintiff.
No counsel for defendants.

CLARK, C. J. This is an action submitted without controversy under Rev., 803. This statute must be strictly construed, *Arnold v. Porter*, 119 N. C., 123; *Grandy v. Gulley*, 120 N. C., 177. It requires that the affidavit must set out that "The controversy is real and the proceedings in good faith to determine the rights of the parties." The affidavit in this case merely sets out that "The controversy between them is genuine, and is submitted to the court to determine the rights of the parties." This is not a compliance with the statute. In like manner, the absence of the words "in good faith" on an appeal *in forma pauperis* in a criminal case is fatal, Rev., 3278; *S. v. Bramble*, 121 N. C., 603. See Anno. Ed. And the failure to follow the statute in civil cases is also ground for dismissal, *Honeycutt v. Watkins*, 151 N. C., 653.

Furthermore, the facts agreed show no cause of action stated against the defendants, and on that ground also it must be dismissed. The facts agreed set out the following: "In the caption and granting clause in said deed, where any reference is made to the grantee, the name Nancy Elizabeth Waters is given, and no other, except in the last clause of the deed these words are used: 'We warrant this title to Nancy Elizabeth Waters, to her and her children and executors and administrators and assigns forever.' The plaintiff paid the consideration recited in the deed, and contends that she owns the land in fee simple, and that the deed on its face shows that it was intended that she should take a fee-simple title. The defendants, who were her only children at the time the deed was given, contend that they are tenants in common with the plaintiffs, and rely upon the last clause in the deed above set out."

It is further agreed that "the plaintiff made a sale of the land described above, but because of the contention of the defendants the purchaser declines to accept her deed. If the court should be of the opinion that the plaintiff is owner in fee simple of said land, the plaintiff will be able to make the sale according to her agreement and contract, otherwise she will not."

The name of the purchaser and the terms of the sale are not set out, nor is the purchaser made a party to this action, and hence any judgment herein would not be binding upon him. Neither are the other children referred to as having been born since the date of the deed parties, and the judgment would not be binding on them.

It is agreed that the deed was dated 5 November 1866 (prior to the Act of 1879), but there is no agreement or allegation as to the date of its execution, nor whether the deed was made to the plaintiff and her heirs, or simply to the plaintiff.

Whether the fee passed out of the grantor to Nancy E. Waters at all depends upon the exact wording of the deed, and whether if she took only a life estate (which is nowhere alleged) the language in the warranty can be construed as a conveyance of the remainder to the two children are matters which cannot be adjudicated unless the deed was before the Court, nor in the absence, as parties to this action, of the heirs of the grantor in the deed to her.

There is such a defect of parties, and of allegations, and in the affidavit of submission, that the judgment in any aspect is erroneous, and must be set aside. Being a consent proceedings, the court could not have directed additional parties or statement of facts to be made *in invitum* to cure the defect.

On the record this is simply a moot question on which the opinion of the court is asked, but on such it will not render its decision. *Bates v. Lilly,* 65 N. C., 232; *Millikan v. Fox,* 84 N. C., 107.

Action dismissed.

A. SAWYER v. CAMDEN RUN DRAINAGE DISTRICT.

(Filed 18 February, 1920.)

1. Summons—Service—Publication—Affidavit—Process.

An affidavit used as the basis for the publication of summons on a nonresident defendant is required to show, among other statutory requirements, in order to a valid service, that the defendant cannot be found in the state after diligent search.

2. Drainage Districts—Negligence—Torts—Damages.

A drainage district is liable in damages for wrongs and torts committed on the property of adjoining owners of lands not embraced in the district being established under the provisions of the statute. See *Spencer v. Wills*, at this term.

3. Same—Final Decree—Outside Lands—Permanent Damages—Election—Judgments—Estoppel—Statutes.

The whole of plaintiff's lands were originally included in a drainage district to be established under the statutory provisions, but the final judgment so restricted and modified the survey, plat and boundaries as to exclude all except a comparatively small portion of the land, the preliminary survey showing that a canal would go through the land included as well as through the land, or a large part thereof, excluded by the final judgment. There was no evidence that ancillary proceedings for this outside lands by condemnation had been resorted to (ch. 442, sec. 7, Laws of 1909), and *Held*, that the plaintiff, in his independent action, may elect to recover the permanent damages caused to his land.

CIVIL ACTION, tried before *Lyon, J.*, and a jury, at July Term, 1919, of CAMDEN.

The action is to recover damages for injury to plaintiffs, caused by cutting a drainage canal through the same, at the instance and for the benefit of the defendant drainage district, the said lands lying outside and below the boundaries of the district.

There was denial of liability, and, on issues submitted, the jury rendered the following verdict:

"1. Did the defendant wrongfully enter upon lands of plaintiff, and cause to be constructed right of way and canal, and cut timber, as alleged in complaint? Answer: 'Yes.'

"2. Is plaintiff's cause of action barred by the statute of limitations? Answer: 'No.'

"3. What damage, if any, is plaintiff entitled to recover? Answer: '$505.50, including interest.'"

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Aydlett & Sawyer and Ehringhaus & Small for plaintiff.

Thompson & Ward for defendant.

HOKE, J. The facts in evidence tended to show that, in January, 1911, certain landowners instituted proceedings to establish defendant drainage district under ch. 442, Laws 1909, and amendments thereto, and filed their petition setting forth the desired boundaries, which included petitioners' lands and a large number of others who were named as parties defendant; that among the latter were the heirs of C. W. Grandy, whose individual names are given, and who then owned a large body of land within the designated territory, containing 450 or 500 acres. That these heirs, being residents of Norfolk, Va., publication was had on affidavit setting forth the nature of the proceedings. That said defendants (naming them) "were all nonresidents; that they were necessary and proper parties defendant in the cause, and that service of summons could not be made on them except by publication according to law." That the preliminary survey and plat showed that the proposed canal would extend for a considerable distance through the tract of land owned by said defendants, but, in the final decree, establishing the drainage district, only 37½ acres of the land was included in the district, and the judgment determining the question of the benefits and burdens is referred to the report as modified and changed in the final decree. Plaintiff, having by proper deed acquired the title of these heirs of C. W. Grandy, sues for the damages caused by cutting the canal through that portion of his land not included in the drainage district, and, in our opinion, his recovery for such damage must be sustained.

The authorities seem to be decisive that, under our statute as now framed, the allegation that a defendant cannot be found in the State, after diligent search, is an essential averment to a valid service of original process by publication. *Davis v. Davis,* at the present term. But, if it be conceded that the affidavit in the present instance contains averments that are the full equivalent of terms referred to, and that the holders of plaintiff's title have been made parties, it is held in this jurisdiction that these drainage districts, established under the provisions of our present statutes, are liable for wrongs and torts committed on the property of adjoining proprietors whose lands are not embraced in the district. While they may have certain municipal powers bestowed upon them, the better to carry out their purpose, being organized primarily for the benefit of individual owners, they are not regarded as municipal corporations in the constitutional sense of the term, nor protected as governmental agencies from suits by individuals except when the same may be authorized by law. They are classed rather with railroads and other *quasi*-public corporations, and may be held liable, as stated, for wrongful invasion of the proprietary rights of thirds persons. *Leary v. Comrs.,* 172 N. C., 25; *So. Assembly v. Palmer,* 166 N. C., 75; *Comrs. v. Webb,* 160 N. C., 594; *Powell v. R. R.,* at the present term; *Brad-*

berry v. Drainage District, 236 Ill., 36; *Bunting v. Drainage District,* 99 Nebraska, 843; *Peck v. Chicago,* 270 Ill., 34.

Speaking to the question in *Leary's case,* and in answer to the position taken by defendants that they were liable neither as a board nor as individuals, *Chief Justice Clark* said: "We think they are liable in both capacities. It is true that the drainage district is a public-service corporation, *Sanderlin v. Luken,* 152 N. C., 738; *Drainage Comrs. v. Farm Association,* 165 N. C., 697, but it is not a governmental agency and occupies the same relative position as a railroad company or other similar *quasi*-public corporation, created for private benefit, but endowed with the right of eminent domain and other public functions by reason of the public benefit."

In our opinion, plaintiff's cause comes within the principle, and, on the facts presented, and the pleadings as now framed, he has rightfully recovered for the trespass upon his land outside of the drainage district. Although the preliminary survey showed that the canal would go through this outside land or a good part of it, and the report declared that "no one would be damaged by the proposed improvement," the final judgment modified this survey and plat and restricted the boundaries of the district to 37½ acres, and this judgment only purported to determine the question of benefits and burdens as to land within the district as established, and not otherwise. Plaintiff therefore has had no adjudication of his right to damages as to this outside land, and no provision is made or opportunity given for the assertion of a claim at his instance till his property was invaded and the injury suffered. True, in section 7 of the statute, provision is made for condemning outside lands when the same cannot be acquired by purchase, this to be done by ancillary proceedings in which the question is directly presented and passed upon, but the record shows no such procedure. On the contrary, the commissioners, through their officers and agents, have entered on this outlying land and cut the canal and shutting off access to certain timber thereon without condemning the same or giving plaintiff an opportunity to be heard as the statute provides and requires. This being true, plaintiff, at his election, may, by his action, recover for the permanent damage done him. *Mason v. Durham,* 175 N. C., 638.

There is no error, and judgment for plaintiff is affirmed.

No error.

S. D. DAVIS v. RUTH DAVIS.

(Filed 18 February, 1920.)

1. Divorce—Venue—Jurisdiction—Motions—Removal of Cause.

The provision of Revisal 1559, that proceedings for divorce shall be returnable to the Court of the county in which the applicant resides is not jurisdictional and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not to dismiss.

2. Summons—Service—Publication—Affidavits—Pleadings—Actions.

Where the verified complaint in an action has been filed setting up a good cause of action at the time an affidavit for publication of service has been made, the two will be regarded together by the clerk in passing upon the matter, and the omission of the affidavit alone to state a good cause of action is not fatal.

3. Summons — Publication — Nonresidents— Due Diligence— Not to be Found.

The fact that the defendant in an action to whom service of summons by publication is sought is a nonresident, is not a sufficient averment in the affidavit, it being necessary to show that after due diligence he cannot be found within the State, without which the process is fatally defective.

4. Appeal and Error—Summons—Publication—Affidavits—Amendments —Divorce—Case Remanded—Superior Court—Evidence—Jury.

The Supreme Court has the power to permit an amendment therein to an affidavit made for the publication of a summons; but where the action is for divorce *a vinculo*, and the defect is in omitting the averment that the defendant cannot after due diligence be found in this State, and it is admitted that the defendant is a nonresident and at the time embraced by the publication, was absent from the State, the Supreme Court may remand the case to the Superior Court to hear and consider the evidence, and the Superior Court Judge, for the purpose of being advised may submit the question to a jury.

APPEAL by plaintiff from *Lyon, J.*, at the September Term, 1919, of BEAUFORT.

This is an appeal from an order setting aside a decree which granted an absolute divorce to the plaintiff.

Upon the hearing of the motion the following facts were found:

1. That on 5 February, 1919, the plaintiff, through his attorney, P. H. Bell, filed with the clerk of this court an affidavit as the basis for an order of publication of summons, which affidavit is in the following form, to wit:

"S. D. Davis, being first duly sworn, says that Ruth Davis is a necessary party defendant to the above entitled action, and further, that the said Ruth Davis is not a resident of the State of North Carolina, and

prays that an order for publication of notice of said action be granted so that notice may be given as required by law."

That the said affidavit was duly sworn to before a notary public on 30 January, 1919.

2. That contemporaneously with the filing of the said affidavit, to wit, on 5 February, 1919, the complaint setting up and stating a cause of action for divorce, with affidavit in due form accompanying same, was filed with the clerk of this court.

3. That on 5 February, 1919, the clerk of this court made the order of publication appearing in the record.

4. That notice of said action, in the form appearing in the record, was published in the *Washington Daily News*, a daily paper published in Washington, Beaufort County, N. C., the first publication thereof being in the issue of 6 February and the last publication in the issue of 6 March, and meanwhile having appeared in the following issues: 8, 11, 12, 15, 19, 20 February; 1, 3, 4, 5 March; and, therefore, that the said notice appeared at least once each week for four consecutive weeks, the last publication being more than thirty days before the first day of the April Term, 1919, of the Superior Court of Beaufort County, which first day was 7 April, 1919.

5. That at the time of bringing the suit the plaintiff had been a resident of the State of North Carolina for more than two years, and while not a resident of the county of Beaufort, that in the selection of the said county as the venue of the action he was acting in good faith, without purpose to take any advantage of the defendant, and that such venue was selected by his attorney in good faith and to expedite the trial and determination of the case.

That at the time of bringing of the action, and at all times material to the controversy, the defendant was not a resident of this State, and has never been in this State, nor was she ever in the State until after the judgment was rendered in this action, but was in the State of Oklahoma.

6. That the defendant did not appear in the action, nor was any motion made on her behalf for a change of venue.

7. That the movant abandons the averment that the plaintiff had not been a resident of the State of North Carolina for two years prior to the commencement of the action, and the jury so found in its verdict.

8. That the jury found, as appears in the record, that defendant, as alleged in the complaint, had committed adultery while the wife of the plaintiff; that the plaintiff is a man of good repute, a minister of the gospel, prominent among his race, and respected by both races, and that since said judgment was rendered he has remarried, and that the woman whom he married last is now with child. That he has the custody and support of the children begotten of the defendant by him.

It was also admitted that at the time the affidavit was filed with the clerk of the Superior Court of Beaufort County as the basis for the order of publication said clerk has no knowledge as to whether the defendant was in North Carolina, or otherwise, except as contained in the affidavit.

The motion to set aside the decree was on the ground:

1. That as the plaintiff was a resident of Wilson County when the action was commenced, the Superior Court of Beaufort County was without jurisdiction.

2. That the affidavit on which the order of publication was based is fatally defective for that it does not allege facts showing that the plaintiff has a cause of action.

3. That said affidavit is also defective because it fails to allege that the defendant could not, after due diligence, be found in this State.

The motion was allowed and the plaintiff excepted and appealed.

Ward & Grimes and Small, MacLean, Bragaw & Rodman for plaintiff.
W. A. Lucas and Wiley C. Rodman for defendant.

ALLEN, J. The first objection of the defendant to the validity and regularity of the decree of divorce is based on section 1559 of Revisal, which provides that "In all proceedings for divorce the summons shall be returnable to the court of the county in which the applicant resides," the defendant contending that this is jurisdictional.

It is evident that the General Assembly did not so intend because it placed the section under the title of venue and not of jurisdiction, and nothing appears to show the purpose to take an action for divorce out of the general principle, which prevails, that any action brought in the wrong county may be removed instead of dismissing it, and that a failure to make the motion for removal is a waiver of the objection to the county in which it is brought.

In section 419 of the Revisal it is declared that actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, and then follows the enumeration of certain causes of action, and the same language is used in section 420 in regard to certain actions.

In the following sections, 421, 422, and 423, provision is made for the trial of actions upon official bonds, domestic corporations, and foreign corporations, and then follows section 424 providing for the place of trial "in all other cases," thus showing a clear purpose to establish the venue of all actions, including divorce, and then the rule is laid down in section 425 applicable to all actions that, "If the county designated for that purpose in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant,

before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court."

It has been held repeatedly that these statutes relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed, if the motion is made in apt time, and if not so made, that the objection is waived, and we do not think that section 1559 was intended to change this principle or that it has any such effect.

The second objection would be well taken if the plaintiff relied alone on the affidavit set out in the findings of fact, because section 442 of the Revisal requires it to be shown by affidavit that a cause of action exists before an order for the service of a summons by publication can be made and the facts constituting a cause of action are not stated in the affidavit, but it appears that at the time of filing the affidavit for publication, and before the order was made, the plaintiff filed his complaint, duly verified, stating a cause of action, and that both papers were before the clerk at the same time, which is, in our opinion, a compliance with the statute, as the complaint properly verified was also an affidavit.

The third objection must be sustained.

Wheeler v. Cobb, 75 N. C., 21, which is approved in *Faulk v. Smith*, 84 N. C., 503, is directly in point.

In that case it was held that an affidavit, filed to procure an order of publication, which stated that the defendant was a nonresident, was fatally defective because of failure to allege that the defendant could not, after due diligence, be found within the State, and the Court held that the defendant in that case was in fact a nonresident, which are identical with the facts in this record.

Bynum, J., speaking for the Court, says: "The service of summons by publication is fatally defective, in that it does not conform to the requirements of the statute. The foundation and first step of service by publication is an affidavit that 'the person on whom the summons is to be served cannot, after due diligence, be found *within the State*.' Bat. Rev., ch. 17, sec. 83. This requirement was omitted in the affidavit, why, it is hard to conceive, as it was made by the attorney himself, who, as a prudent practitioner, should have had the statute before him in drafting the affidavit. For this Court had repeatedly held that the provisions of this statute must be strictly followed. *Spiers v. Halstead*, 71 N. C., 210. Everything necessary to dispense with personal service of the summons must appear by affidavit. The mere issuing of a summons to the sheriff of the county of Pasquotank, and his endorsement upon it the same day after it came to hand, that 'the defendant is not found in my county,' is no compliance whatever with the law; for it might well be

that the defendant was at that time in some other county in the State, and that the plaintiff knew it, or by due diligence could have known it, and make upon the defendant a personal service of the summons. Every principle of law requires that this personal service should be made, if compatible with reasonable diligence."

The same principle was declared in *Sheldon v. Kivett,* 110 N. C., 408, in which *Clark, J.,* says of an affidavit, which alleged nonresidence but omitted to state that the defendant could not after due diligence be found within the State, "the original affidavit was defective in the particulars in which it was amended."

It was also held by the Circuit Court of Appeals, in *Flynt v. Coffin,* 176 Fed., 872, in an opinion by *Goff, J.,* concurred in by *Waddill* and *Connor, JJ.,* that "Under Revisal, N. C., 1905, sec 442, which in certain cases authorizes the making of an order for service of process on a defendant by publication, where it is made to appear by affidavit to the satisfaction of the court that such defendant 'cannot, after due diligence, be found within the State,' as construed by the Supreme Court of the State, an affidavit alleging or showing due diligence and that defendant cannot be found within the State is an essential condition precedent to a valid service by publication, and an affidavit in an attachment suit which merely alleges that defendants are residents of another State, and cannot be found within the State, but fails to show any diligence or search whatever, is fatally defective, and a publication based thereon does not give the court jurisdiction."

The reason for thus holding is that the statute requires an affidavit to be filed stating that the defendant cannot, after due diligence, be found in the State before an order for publication can be made, and an allegation of nonresident is not the equivalent of an allegation of diligence, as many nonresidents spend many months in the State, and can, with proper diligence, be served personally.

We would therefore affirm the judgment upon the record made in the Superior Court, but the plaintiff moves here to be allowed to amend his affidavit.

It is held in *Kivett v. Sheldon, supra,* that the power to amend an affidavit for publication in the particular in which the one before us is defective, exists in the Superior Court, and in *Robeson v. Hodges,* 105 N. C., 50, that, "This Court has the power to make amendments or to remand the case that they may be made in the court below (The Code, par. 965), but only to the same extent and in such cases as the Superior Court could allow amendment."

If, however, there was no authoritative decision on the question, the Revisal, sec. 1545, is clear that the Supreme Court has the power to amend any process, pleading, or proceeding in form or substance, or to

remand in order that the amendment may be made in the Superior Court, if, upon a full development of the facts it appears to be proper and just for it to be done, and this is a proper case for the exercise of the power in one way or the other, as it appears from the findings of fact that the plaintiff is a man of good character; that he was acting in good faith; that the application for publication was drawn by his attorney; that the defendant had never been in the State, and could not have been found therein; and that the plaintiff, relying upon the decree, has since married and has a child by his second wife.

This makes out a strong case for the plaintiff, and one which would justify the exercise of the power of amendment at once in his behalf, but it must be kept in mind that the defendant has had no opportunity to be heard on the allegations of the complaint, and that the verdict and decree convict her of adultery, and that we have no means of investigating the truth of this charge, while in the Superior Court additional evidence may be heard, and the court can, for the purpose of being advised as to the facts, submit the question to a jury.

We therefore conclude that the motion to amend should be considered, and in order that both parties may have full opportunity to introduce evidence and to present their several contentions, that the motion should be referred to the Superior Court to be heard and passed on as if originally made therein, and to that end the cause is remanded to the Superior Court.

Remanded.

A. B. BELL AND WIFE v. W. B. HARRISON AND B. G. GREGORY.

(Filed 18 February, 1920.)

1. Fraud—Deeds and Conveyances.

Fraudulent representations made in the procurement of a deed sufficient to set it aside must be untrue in fact, made by the party inducing it with a knowledge of its being false or consciously ignorant thereof with intent that the other party should act thereon, or calculated to induce him to do so, and upon which he acted to his damage.

2. Same—Evidence—Consideration—Actions.

Upon evidence that the plaintiff, an heir at law of a deceased person, not knowing he was such, was informed thereof by another heir, and while the corpse was yet in the house represented to him that he, upon investigation, had ascertained that his share was worth about one thousand dollars, offered this amount upon condition of immediate acceptance, cautioning secrecy, and accordingly obtained a deed from the plaintiff and his wife soon thereafter; that the plaintiff was a man below the average business intelligence, relied upon and had great confidence in the defendant, and his statement caused him to accept his offer; that

in fact the plaintiff's interest in the estate was worth some four or five times the amount he had received for it; *Held*, sufficient evidence of fraud to sustain a finding of fraud by the jury and to set aside the conveyance.

3. Fraud—Deeds and Conveyances—Consideration—Evidence—Instructions.

Where there is evidence of a grossly inadequate consideration with other evidence of fraud in the procurement of a deed sought to be set aside on that ground, an instruction that the inadequate consideration alone would be sufficient to infer the fraud, will not be held as reversible error, or considered when given in response to the appellant's request.

4. Appeal and Error—Assignment of Error—Record—Certiorari.

An assignment of error will not be sustained which contradicts the statement in the record on appeal, in the absence of a correction of the record accordingly by certiorari.

5. Fraud—Deeds and Conveyances—Evidence.

A grossly inadequate consideration given for a deed to lands may be considered upon the question of fraud in its procurement with other evidence thereof.

CIVIL ACTION, tried before *Lyon, J.*, and a jury, at July Term, 1919, of CAMDEN.

This action was brought by plaintiffs to set aside a deed made by them to defendants, upon the ground of fraud.

It appeared in evidence that one John G. Gray died intestate on 12 September, 1917, seized and possessed of a large estate of both real and personal property, and left surviving him four heirs, the plaintiff inheriting an undivided one-fourth interest in the estate. On the day of Mr. Gray's death, while plaintiff was at the home of Mrs. Harrison (mother of defendants), where Mr. Gray died, for the purpose of attending the funeral, he was approached by the defendant Gregory and told for the first time that his uncle had died intestate, and that he was an heir. Gregory showed him money which he was paying the undertaker, and then called him into another room and told plaintiff he wanted to buy plaintiff's interest. He further stated that they had taken charge of the estate and investigated it, and that he did not think the estate would net above debts and expenses $4,000, making plaintiff's share not much more than $1,000, and perhaps not so much; and further, that they wished (on account of his mother's health and the effect it might have upon her to let the matter drag along) to close the matter up as quickly as possible. Harrison was called in, informed of what had taken place, and corroborated Gregory's statements as to the investigation and the value, and they offered plaintiff the $1,000 for his share for quick acceptance.

There was further evidence that plaintiff, having great confidence in defendants, informed them that he did not know about the estate, and

that if they had investigated the matter and thought that was all that was due him, he would take it, of course. He believed and relied upon these statements; plaintiff knew nothing of the notes, cash or chattels of the estate, and that plaintiff signed the deed in question next day, receiving in payment a note for $800 and interest, and the balance of $168 in cash. Both note and cash were taken by defendant from the estate, so that plaintiff was paid out of the estate itself. Plaintiff is a man of advanced years, poor health, and limited education, with practically no business experience, and his capacity for trading is below the average.

Six days later defendants paid $3,000 to plaintiff's sister for exactly the same interests; and four days later, Harrison, qualifying as administrator, made affidavit and inventory showing $2,400 worth of personalty belonging to the estate. Within thirty days the timber from a single tract of land was sold by defendants for $5,300, and there were practically no debts due by the estate, its total net value, at the time, was approximately eighteen to twenty-four thousand dollars, and plaintiff's share was, therefore, four thousand five hundred to six thousand dollars.

Gregory and Harrison are half brothers, sons of Mrs. Susie Harrison, sister of John G. Gray, the intestate, and they are first cousins of A. B. Bell, the plaintiff, whose father was a brother of John G. Gray.

Plaintiff testified as follows: "I do not recall who was at the house when I got there, but saw Mr. Harrison and Mr. Gregory there. I had not been there over an hour before mention was made to me of my uncle's affairs. At the time I went there I had no information that I would participate in the estate of my uncle. It was first brought up by Mr. Gregory. Q. Tell what was said by him, and how it came up? A. He said Brother John is dead and left no will. Q. I want to know if you were present when any money was paid to the undertaker? A. Yes; he came out there with three bills in his hands, twenties and a ten, and he came out there and said, do you see that, and then went on and gave it to the undertaker. Q. Was anything else said by him? A. No. Q. What was the next thing that he did? A. He touched me on the shoulder and said let me see you a minute, and I went on down there and went in the house, and got in a room on the south end of the house and locked the door, and then he said he wanted to buy me off, and he said that Brother John had died without a will, and our attorney says that you and your sister are half owners in the estate, and I said, are we? and he said 'Yes,' and I told him I did not know anything about it, and he said we want to buy you off. Q. Did Mr. Harrison come in? A. Yes; later he said we want to buy you off, and we have investigated the matter, and I think that $1,000 is as much as you will get, and we want to close up the matter as quickly as possible on account of mother (Mrs. Susie Harrison). He said that it might amount to more than $1,000, or not

quite as much. Q. Why on account of her? A. He said that she was frail and that it would be the end of her. I had no information about the indebtedness of my uncle, and none at all about the expenses. I said I did not know anything about it. Harrison was not in there then. After he said he would give $1,000, and I might not get as much, he said I will go back and get Billie and we will talk the matter over. He (Gregory) says, you know that you have had $2,000, and I (Gregory) have not had a penny, and have been for thirty years a servant, and have had nothing, not even a penny. I said I will leave the matter to you, and if you have been and investigated it I reckon I will take it. He then went and got Billie (who is Harrison), and he told Billie what I had agreed on. Mr. Harrison said, I think that is a fair proposition. He mentioned to Harrison what he told me about having taken charge and investigated. He said to Mr. Harrison that he did not think it would exceed over $1,000, and Mr. Harrison said that he did not think so either. No one else was present. Mr. Gregory said that he did not want to go in court. I said I do not know about the estate, and if you have investigated the matter and think that is all that is due me, of course I will take it. It is a fact that I had not investigated it, and relied upon them. I had confidence in them, and we were brother and sister's children. We were always friends. I associated with them. We have always been warm friends, and I had all manner of confidence in them, and thought that they would treat me right, because we were boys together and cousins. I believed what they said about it. They told me to keep it a secret, and not even to tell my wife when I went home. This was said at the time, before we left the room. I do not know what personal property my uncle had. I knew nothing about the notes. He never said anything about any notes, said nothing about cash. All the cash that I saw was what he brought out there, and he just mentioned that much. I do not know anything about the gas boat that my uncle owned. I knew nothing about his indebtedness. This was on 13 September, between 12 and 1 o'clock. I remained until after two o'clock, until after the funeral was over. I think Mr. Harrison is a good, ordinary farm man. He had good experience; he had been a steward in the Methodist Church, and I thought he could be relied upon. I had confidence in him. Do not think either one of them had ever lived with their uncle, Mr. Gray. They used to go to the house where he and their mother lived right often, and they were there most every time I went. I went home about sundown. I went home from the burial. The body was still in the house when the conversation took place; saw them next morning, near 8 o'clock. They were down the road in an automobile, coming to my house. They came there and I went and got in the automobile and went to the register of deeds' office. The

register of deeds had an office in a store in Shiloh, where we went. When we reached the office of Mr. Forbes, the register of deeds of Shiloh, they said we have come to have a deed fixed. I went with them to Mr. Forbes'. I only knew the boundaries of the place on one side. It was the piece of land that I had inherited from my grandmother. Mr. Gregory told Mr. Forbes, who came to my corner, then I gave the description down to my line. This piece was known as the Flora place. Q. Tell if you signed the deed there? A. Yes. Q. Was anything paid you then? A. No. Q. Was anything said about the note? A. No. Q. What did you do then? A. They went back to my house. Q. All three of you together? A. Yes. Q. Did you see your wife there? A. Yes. Q. Did you go in? A. No. Q. Had you told your wife anything about this trade? A. No; not until I started from the house to the steps in an automobile; she asked me where I was going, and I said I was going to make a deed to them, and I said that they had promised to give $1,000, and asked her what she thought about it, and about that time I was on the steps and they were hurrying me up. Q. Did you tell her what the estate would net? A. No; I said they would give me $1,000 for my interest in the estate. Q. Do you remember everything that you said to her? A. That was all that I said to her. Q. When you came back she signed the deed then? A. Yes; we all went in the porch and Mr. Forbes went in the house, and none of the others. Forbes went in there and she signed the deed and he came back on the porch, and then Gregory said, I guess you just as soon have a good note, and I said I don't know that it would make much difference, and he said I have got two, one due this January and one next, and I said if I have to take either one, give me the one due this January. Q. Did you look at the notes? A. No. Q. Did you know the signers of the note? A. No. Q. Did you know anything about the signatures to the note? A. No; he just said that it was a good note. Q. How much cash did he pay you. A. $168. Q. The note belonged to the estate of John Gray? A. Yes."

There was much evidence offered on both sides upon the issue of fraud. The jury returned the following verdict.

"1. Was the deed dated 14 September, 1917, obtained by the defendants, or either of them, by fraud, as alleged in the complaint? Answer: 'Yes.'"

Judgment for plaintiffs, and defendants appealed.

D. H. Tillitt and Ehringhaus & Small for plaintiffs.

W. I. Halstead, Thompson & Wilson, and Aydlett & Sawyer for defendants.

WALKER, J., after stating the case: There was ample evidence to support the finding of the jury, that the deed executed by the plaintiffs

to the defendants was obtained by fraud, that is, that defendants falsely represented to the plaintiff, A. B. Bell, the value of the estate with the intention of inducing him to part with his share of it at a greatly reduced price, and that he was persuaded to do so by reasonably acting upon the representations, which he believed to be true. The defendants stated to him that they had investigated the affairs of the estate, which they had in charge, and knew its value. The jury could well infer that they intended to take advantage of his known ignorance of the true situation, and to mislead him as to the correct value of his interest in the estate, with a view to acquire it for their own benefit at an undervalue. There is evidence that he placed full confidence in what they said to him about the value of the estate, and this they well knew, and took advantage of it, and of his ignorance, and lack of business judgment and capacity to make a large profit on the transaction. He seems to have been an easy prey to their allurements, and to have quickly succumbed to their insidious practices and deceptive inducements. It must be done at once, they said to him, so as not to worry their mother, Mrs. Harrison, and he was asked not to tell any one of it, not even his wife. This was done to prevent detection of their scheme to defraud him by his consulting others wiser than he, and whose advice might defeat their purpose. For this reason, too, they started early to lay their plans, even before the burial of the intestate. If the jury believed the plaintiff's witnesses, as it appears was the case, it was rather a bold case of fraud.

The case, in its main and essential features, is not, in principle at least, unlike *Walsh v. Hall,* 66 N. C., 233; *Hodges v. Wilson,* 165 N. C., 323; *Dixon v. Green,* 178 N. C., 205; *Modlin v. R. R.,* 145 N. C., 218; *Whitehurst v. Ins. Co.,* 149 N. C., 273; *Sprinkle v. Wellborn,* 140 N. C., 163; *Griffin v. Lumber Co.,* 140 N. C., 514. It was said in the *Whitehurst case* that it is not always required for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity, citing *Modlin v. R. R., supra; Ramsey v. Wallace,* 100 N. C., 75; *Cooper v. Schlesinger,* 111 U. S., 148; Pollock on Torts (7 ed.), 276; Smith on Frauds, 3; Kerr on Fraud and Mistake, 68. And it is further held there, on the authority of Pollock on Torts, *supra,* that in order to create a right of action for deceit there

must be a statement made by the defendant, or the person charged with the fraud, and with regard to that statement the following conditions or elements must be present and concur: It must be untrue in fact; the person making the statement, or the person responsible for it, must either know it to be untrue, or be culpably ignorant (that is, recklessly and consciously ignorant), whether it be true or not; it must be made with the intent that the other party should act upon it, or in a manner apparently fitted for that purpose, or calculated to induce him to so act, and, finally, that he does act in reliance on the statement in the manner contemplated, or manifestly probable, and thereby suffers damage. And Smith on Frauds, *supra,* is quoted in support of the principle as follows: "The false representation of a fact which materially affects the value of the contract, and which is peculiarly within the knowledge of the person making it, and in respect to which the other party, in the exercise of proper vigilance, had not an equal opportunity of ascertaining the truth, is fraudulent. Thus representations made by a vendor to a purchaser of matters within his own peculiar knowledge, whereby the purchaser is injured, is a fraud which is actionable. Where facts are not equally known to both sides a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he, impliedly, states that he knows facts which justify his opinion."

Kerr on Fraud and Mistake, *supra,* refers to the doctrine in this language: "A misrepresentation, however, is a fraud at law, although made innocently, and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and has been acted on by him, accordingly, to his prejudice. If a duty is cast upon a man to know the truth, and he makes a representation in such a way as to induce a reasonable man to believe that it is true, and is meant to be acted on, he cannot be heard to say, if the representation proves to be untrue, that he believed it to be true, and made the misstatement through mistake, or ignorance or forgetfulness."

The general rule seems to be established in recent years that where an action for damages will lie for a deceit, in the sale of land, a suit in equity, now a civil action, may be maintained to set aside the deed for the fraud. It is so held in *Walsh v. Hall, supra,* which is approved in *Griffin v. Lumber Co., supra,* where the Court said: "Whatever doubt may have existed in regard to the right to maintain an action for deceit relating to contracts for the sale of land respecting acreage, title, etc., is removed by the decision in *Walsh v. Hall,* 66 N. C., 233. *Dick, J.,*

after noting the general rule of *caveat emptor,* says: 'But in cases of positive fraud a different rule applies. . . . The law does not require a prudent man to deal with every one as a rascal, and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. . . . If representations are made by one party to a trade which may be reasonably relied upon by the other party—and they constitute a material inducement to the contract—and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice.' "

The rule as to actionable deceit was originally stated in *Pasley v. Freeman,* 3 Term Rep., 51 (2 Smith's Leading Cases (5 Am. Ed.), margin page 55), as follows: "A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damages, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is."

Chancellor Kent said of the rule, as thus stated, that the case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action, and that it is as just and permanent a principle as any in our whole jurisprudence. And the doctrine is equally well settled in equity that fraud will avoid a contract when a party is misled without his fault, and to his prejudice, by the dishonest practices of another to his prejudice, which were calculated and expected to deceive him into acting imprudently. The rule is clearly stated by another Court, which held that fraud in the procurement of a contract avoids it; and where a party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another or to entrap or cheat him or to obtain an undue advantage over him, in every such case there is positive fraud in the truest sense of the term—there is an evil act with an evil intent—and the misrepresentation may be as well by deeds and acts as by words, by artifices to mislead as by positive assertions. *Tolley v. Poteet,* 62 W. Va., 231. See, also, *Butler v. Watkins,* 13 Wallace, 456 (20 L. Ed., 629); *Laidlow v. Organ,* 2 Wheaton, 178 (4 L. Ed., 214).

In a court of conscience a deliberate falsehood, or deliberate concealment, it being equivalent thereto, as to a material element in the contract of sale, which is calculated to deceive and mislead another into making the same, and so intended, will induce the court to intervene in behalf of the injured party, to prevent a consummation of the fraud, or to restore

his rights to him. *Crosby v. Buchanan,* 23 Wallace (U. S.), 420. It will be observed that in some of the cases we have cited, the courts were dealing with a fraudulent concealment of material facts where the offending party was under a duty or obligation to disclose them to the other contracting party, but this case is stronger than those, because here the representation of value was knowingly false, and actually misled the plaintiff into conveying his interest in the estate to the defendants, whereby he lost, and they gained, a large sum. It is a clear case of fraudulent deception and circumvention, if we accept the evidence of the plaintiffs as true, which the jury did. The plaintiff had no substantial knowledge of the facts in regard to the value of the estate, and defendants knew that he was ignorant of it. They took advantage of this ignorance by misleading him as to its true value, stating, in order to inspire confidence in them, that they had actually investigated the matter and knew what it was worth, and hurried him into acting, so that he could not acquire correct information of its value before signing the deed, or take the advice of his friends. They will not be heard to say, under the circumstances, that he should not have believed or trusted them, for they were stating positively a fact as within their knowledge, and he, having confidence in their integrity, as he stated, relied upon their statement, and was thereby prevented from making any investigation in his own behalf. They were shrewd traders, and he was not, having had little or no experience in business affairs. As the jury evidently found the facts to be, a case of intentional fraud was completely made out, and the charge, in respect to that feature, was correct, and the court gave all the instructions to which defendants were entitled.

In regard to the instruction as to the effect "of a grossly inadequate consideration alone being a fact from which fraud could be inferred," if it be true, when the whole charge is considered, that the court so instructed the jury, and that it was erroneous to do so, the record shows that the court was responding to a request from the defendants as to what would constitute such a consideration, and as to its effect upon the question of fraud; and its sufficiency, of itself, to show fraud. A party cannot complain of an instruction given at his own request; nor will an assignment of error be sustained which conflicts with the statement of the case upon the question whether the instruction was so given. The judge's statement, as to what was done, must stand, in the absence of any correction of the record by *certiorari* or otherwise.

The court correctly told the jury that they might consider the inadequacy of the consideration upon the question of fraud. *Hodges v. Wilson, supra,* and the jury, it would appear, based their finding, not alone upon the inadequacy of consideration, however "gross" it was, but upon the allegations of the complaint, and the entire evidence supporting

them, so that it is found that the false representations were made by defendants with intent to deceive the plaintiff, who was induced thereby to convey his land to them for an inadequate consideration, and, in that view, if the instruction had been given by the judge without any request from defendants, and was erroneous, it did no harm.

We have carefully reviewed this case, and find no error therein of which the defendants can justly complain.

No error.

B. H. CHAMBERS ET AL. v. THE NORTH RIVER LINE, INC., ET AL.

(Filed 18 February, 1920.)

1. Lessor and Lessee—Leases—Covenant to Repair—Negligence—Act of God.

The lessee's covenant to maintain the leased premises in its present condition is equivalent to a general covenant to repair and leave in repair under the common law, and unless otherwise stated in the lease or provided by statute this duty is not affected by the lessee's negligence or the fact that the property had been destroyed during the continuance of the lease by the act of God or the public enemy.

2. Same—Common Law—Statutes—Modification—Ice—Fire.

Where a wharf and pier are the subjects of a lease wherein the lessor has covenanted to maintain, etc., and its partial destruction was caused by the breaking up of the ice on the water, the lessor's obligation is not affected by our statute, Rev. 1935, which modifies the common law only in instances where the leased premises is destroyed or damaged to more than one-half of its value by accidental fire not occurring from the want of ordinary diligence on the part of the covenanter. Revisal, sec. 1992 is confined to demised houses or other buildings, expressly excluding "agreements respecting repairs, etc.," and has no application.

3. Lessor and Lessee—Leases—Covenants to Repair—Rents.

Where the lessor has failed to fulfill his covenant obligating him to repair the leased premises, he, may not successfully resist his lessor's demand for the full payment of rent contracted for, on the ground of the worthlessness of the premises after its partial destruction.

APPEAL by defendants from *Lyon, J.*, at September Term, 1919, of CAMDEN.

This is an action to recover damages for failure to rebuild a wharf known as "Shiloh" wharf, and for rent under the lease thereof. The case was submitted upon facts agreed. It appeared therefrom that the defendant lessee covenanted "to maintain the said wharf in its present condition during the continuance of this lease"; that the defendant com-

pany went into possession of the premises and paid the rents provided therein up to 31 December, 1917; that on 15 January, 1918, 270 yards of said wharf were totally destroyed, leaving standing and remaining only 100 yards thereof next to the shore, built over shallow water, and about one-half of the pier-head. The freight house at end of said wharf was also completely destroyed.

It was also stated in the facts agreed that "the destruction of said 270 yards of wharf, including the freight house as aforesaid, was due solely to the freezing of Pasquotank River, and the subsequent breaking up of the ice therein, which swept the same away, and the destruction was not due in any part to any fault or negligence on the part of the defendant company. The 100 yards of wharf remaining, as aforesaid, including the one-half of the pier-head also remaining, and all other property rights mentioned in said lease, are absolutely incapable of use for the purpose mentioned in the lease, unless the 270 yards of wharf and the freight house, swept away as aforesaid, be rebuilt."

It was further agreed by the parties that "said freeze began on 31 December, 1917, and continued till 24 January, 1918, and there had been only three such freezes in that locality in the last forty years." It is admitted that immediately after the destruction of the property aforesaid, the plaintiffs called upon the defendant to replace the same, and the defendant declined to do so, denying any further liability under the lease, and has made no use of the premises since that time. It was agreed, at the time of the refusal of the defendant to rebuild, that the cost of rebuilding the wharf and freight house would be $1,000.

Upon the above admissions the court rendered judgment that under the terms of the lease the plaintiff recover $1,000, the cost of replacing said property, and $420, the rent accrued since 31 December, 1917, up to 30 September, 1919, and the costs. Appeal by defendants.

Meekins & McMullan for plaintiffs.
Ehringhaus & Small for defendants.

CLARK, C. J. The court properly held that by reason of the failure of the defendant to rebuild the 270 yards of wharf and repair the damages to the freight house there was a breach in its covenant "to maintain the said wharf in its present condition during the continuance of this lease." And that the defendant was liable for rent to the trial, notwithstanding the destruction of the wharf, and for the damages, $1,000, which it was agreed by the parties would be the cost of replacing the destroyed wharf and repairing the freight house.

The defendants contended that said covenant did not obligate the defendant to replace the property, which had been destroyed without

fault or negligence on its part, and that the destruction of the property also released the defendant from liability for rent. The court rendered judgment against the defendant on these points, and it appealed. The plaintiff contended that the defendant was further liable not only for rent and $1,000 agreed upon as the cost of replacing the wharf, but also for the difference in value of the property before and after the destruction of the wharf, plus the present cash value of the rent for the remainder of the unexpired term. The court held against this contention, and the plaintiff did not appeal.

The covenant "to maintain the premises in their present condition during the continuance of this lease" is equivalent to a general covenant to repair and leave in repair under the common law. It is well settled by the authorities that under a covenant of this kind, "when the property is destroyed by fire, flood, tempest, or other act of God or the public enemy," it is the duty of the contracting party to rebuild, unless relieved therefrom by statute or exceptions specially incorporated in the lease.

The law is thus summed up in 16 R. C. L., title "Landlord and Tenant," sec. 605: "It is the well settled common-law rule that a tenant's general covenant to repair the demised premises binds him under all circumstances, even though the injury proceeds from an act of God, from the elements, or from the act of a stranger," and if he desires to relieve himself from liability to injuries resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant. Under this rule, if the tenant enters into an express and unconditional covenant to repair and keep in repair, or to surrender the premises in good repair, he is liable for the destruction of buildings not rebuilt by him, though the destruction may have occurred by a fire or other accident or by the act of enemies, and without fault on his part."

In 18 A. & E. (2 ed.), 249, the rule is thus stated: "A general covenant by the tenant to repair or keep premises in repair includes a covenant to rebuild, and it was settled at an early date that such covenant imposes upon the tenant the obligation to rebuild in case the premises were destroyed." It is further said that "the obligation to rebuild in case of the destruction of the premises imposed by the lessee's covenant to repair, exists irrespective whether the destruction was caused by storm, flood, fire, inevitable accident, or the act of a stranger."

The word "maintain is practically the same thing as repair, which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction." *R. R. v. Bryan* (Texas), 107 S. W., 576, citing *Verdin v. St. Louis* (Missouri), 27 S. W., 447.

In *R. R. v. Iron Co.*, 118 Tenn., 194, it was held that where a railroad company agreed to construct and lay a branch track to the mines of a

mining company, and to "maintain and operate the same," the railroad company was obligated to reconstruct a bridge constructed by the mining company after the bridge was washed away by an extraordinary freshet, though the bridge under the contract would become the property of the mining company after completion.

In *Pasteur v. Jones,* 1 N. C., 393, the Court held: "That where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by fire, the Court of Equity would compel him either to rebuild or pay the value of the buildings."

The defendant is not relieved by Rev., 1935, which provides: "An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than half of its value by accidental fire not occurring from the want of ordinary diligence on his part." This statute was enacted to change the rule, formerly existing, but limits its application to the destruction of a house by accidental fire, and only then where it is damaged to more than half its value. It does not apply to this case where the destruction is not by fire, but by ice and flood. In 18 A. & E., 307, "the question as to the liability of the tenant, in case of the accidental destruction of the buildings, has chiefly arisen where the buildings have been accidentally burned, but applies equally whatever the causes of their destruction. The tenant is not relieved from future rents though the demised building is destroyed by reason of inherent defects existing at the time of the letting."

The same rule is laid down in 24 Cyc., 1089: "According to the common-law rule, which has been followed generally in this country, a covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild the demised premises if they are destroyed during the term by fire or other casualty, even where he is without fault," citing a large number of cases. It is pointed out, however, that in some States this rule has been modified by statute. In this State the only modification has been as above stated in the case of a house destroyed by fire or damaged to more than one-half.

As to rent, this Court has sustained the common-law rule as to the liability of the tenant therefor, notwithstanding the premises have been destroyed by fire. *Improvement Co. v. Coley-Bardin,* 156 N. C., 257, where the Court said: "The common law regards such a case as the one in evidence as the grant of an estate for years to which the lessee takes title. The lessee is bound to pay the stipulated rent, notwithstanding injury by flood, fire, or other external causes. It required a statute of the State to relieve the lessee where the property is destroyed by fire."

The liability of the defendant for rent is in no wise affected by Rev., 1992. An inspection of this statute will show that not only is it in terms

confined to a demised house or other building, but that it expressly excepts from its provisions those leases in which there is an "agreement respecting repairs." An inspection of the statute will further disclose that by its express terms it requires, as a condition precedent to its application, that a lessee "surrender his estate in the demised premises by a writing to that effect, delivered or tendered to the landlord within ten days from the damage."

It thus appears that the liability for rent upon the part of the defendant is controlled by the rule of the common law, unaffected by any statutory provisions.

Affirmed.

FIRST NATIONAL BANK v. TARBORO COTTON FACTORY.

(Filed 18 February, 1920.)

Attachment—Affidavit—Intent to Defraud—Grounds for Belief—Courts.

The affidavit upon which a warrant of attachment has been issued is fatally defective which alleges that the defendant is about to assign, dispose of and secrete the money or goods with intent to defraud creditors without setting forth the grounds upon which this belief is based so as to enable the Court to adjudge of their sufficiency.

MOTION to vacate attachment, heard before *Connor, J.,* at December Term, 1919, of EDGECOMBE.

The attachment was vacated, and the plaintiff appealed.

John L. Bridgers and Henry C. Bourne for plaintiff.
Don Gilliam and Henry Staton for defendant.

BROWN, J. On 8 November, 1919, upon affidavit of the plaintiff, the clerk of Superior Court issued a warrant of attachment, attaching a certain sum of money, then in the hands of the sheriff, belonging to the defendant. At the same time summons was issued and complaint filed, stating a cause of action, and both summons and copy of complaint, together with warrant of attachment, were duly and properly served on the defendant. Motion was made by defendant to vacate the attachment, and petition and affidavit by defendant were filed, and answer to petition and affidavit were duly filed by plaintiff, and on hearing the motion to vacate before his Honor, Judge Connor, it was adjudged that the plaintiff had not alleged sufficient facts to sustain the warrant of attachment, and the same was vacated, from which judgment plaintiff excepted and appealed.

The precedents seem to hold that the affidavit upon which the warrant of attachment was issued is insufficient. It alleges that the defendant is about to assign, dispose of, and secrete the sum of money in the sheriff's hands with intent to defraud its creditors, but it fails to set forth the grounds upon which this belief is based. This omission is fatal. *Hughes v. Person,* 63 N. C., 548; *Judd v. Mining Co.,* 120 N. C., 399; *Wood v. Harrell,* 74 N. C., 338; *Peebles v. Foot,* 83 N. C., 102. These cases all hold that the mere assertion of a belief that the defendant is about to assign or dispose of its property with intent to defraud the plaintiff is insufficient, but that the grounds upon which such belief is founded must be set out in order that the court may adjudge if they are sufficient. The same rule holds in applications for the appointment of receivers. *Hanna v. Hanna,* 89 N. C., 68. We do not think that the defective affidavit of the plaintiff is aided by the answer of the defendant.

It is possible the plaintiff may have mistaken its remedy. It appears that the Tarboro Cotton Factory is an insolvent corporation; that its property, with the exception of a small piece of land, was sold under a deed of trust, and that the plaintiff was one of the bondholders and received its share of the proceeds of sale. The tract of land was sold under execution against the defendant, and, after satisfying the debt, a certain sum remained in the hands of the sheriff, which was attached in this cause by the plaintiff for the purposes of satisfying the balance due upon his bond. It is possible that the plaintiff's remedy, which may be done in this cause, is to apply for a receiver for the assets of the insolvent corporation, to the end that they may be applied equitably to the debts of the corporation. *Wood v. Staton,* 174 N. C., 246.

The order vacating the attachment is

Affirmed.

DONNIE RICKS v. MRS. R. U. BROOKS ET AL.

(Filed 18 February, 1920.)

1. Fraud—Mortgages—Deeds and Conveyances—Burden of Proof—Evidence.

In a suit to remove a cloud upon the plaintiff's title, Revisal, sec. 1509, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud. *Held,* the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the reformation or correction of a conveyance of land.

2. Same—Equity—Subrogation—Accounting.

Where the mortgagee has foreclosed under a power of sale in a valid mortgage and has conveyed the land in fraud of the mortgagor's rights

under an arrangement between the purchaser and himself, the purchaser is entitled only to be subrogated to the right of his grantor, which is to foreclose under the mortgage, and an accounting of the debt may be ordered by the Court, and, if the debt is not paid, with further appropriate relief for its payment.

3. Mortgages—Deeds in Trust—Power of Sales—Time of Sale—Notice—Statutes.

The time of sale of lands, under the power in a mortgage, must be in accordance with the notice thereof, as given or named in the advertisement and as required, so that there may be fair and competitive bidding, for otherwise the sale will be declared void, Revisal, sec. 641.

4. Pleadings—Allegations—Cause of Action—Defective Statements.

There is a difference observed between the statement in a complaint of a defective cause of action, and a defective statement of a good cause of action, for in the latter, if there is no request to have the pleadings made more certain or definite and no demurrer, the defective statement may be waived or cured by the answer.

5. Same—Appeal and Error—Motions—Statutes.

Pleadings should be liberally construed to determine their effect, and with a view to substantial justice between the parties, and when it appears on appeal from a motion to dismiss, on the ground of the insufficiency of the complaint to allege a cause of action, that merely a good cause has been defectively stated, the action will not be dismissed in the Supreme Court on motion made there, but if necessary, an amendment will be allowed to conform the pleadings to the facts proved, and the Court will disregard errors or defects in the pleadings or proceedings in the Superior Court, which are immaterial and where no substantial rights of the appellant will be injuriously affected thereby. Revisal, sec. 407 and 509.

6. Deeds and Conveyances—Chain of Title—Incapacity of Grantor—Mental Capacity.

Where the title to land is involved, any deed in the adversary's chain may be attacked as invalid in law, for lack of capacity in the grantor to make it. *Mobley v. Griffin*, 104 N. C., 112, cited and approved.

CIVIL ACTION, tried before *Whedbee, J.*, and a jury, at May Term, 1919, of NASH.

This is an action, under the statute (Rev., 1509), to try and determine the title to land, or to remove a cloud from the title of plaintiff to an undivided interest in a certain tract of land, the defendants claiming the same by virtue of a foreclosure sale and deed, under a power contained in a mortgage deed, and *mesne* conveyances.

In 1905 Louis Ricks died seized and possessed of a tract of land in Nash County, containing 218 acres. In his will, duly probated, he devised this land to his wife, Lucinda Ricks, for life, with remainder to the plaintiff, and his brothers and sisters, one-ninth each.

In 1906 the plaintiff and four of his brothers each executed a mort-

gage and crop lien to the Brooks Mercantile Company, covering their respective interests in said tract of land.

In July, 1911, R. U. Brooks, president of Brooks Mercantile Company, acting in the name of the corporation which was then in process of dissolution, sold the land, under the power contained in the mortgages, and executed deeds to B. A. Brooks, his son and the attorney of the corporation, for plaintiff's interest in the land. The total consideration recited in the five deeds exceeded $1,500. At the same time B. A. Brooks reconveyed all five interests in one deed to R. U. Brooks, for a recited consideration of $1,000. No consideration was actually paid for the transfer, and the plaintiff was not credited with any of the proceeds of the sale.

The alleged foreclosure deed recited that sale of said premises was had on Monday, 12 March, 1907. The notice of sale published in the *Nashville Graphic* the week prior to the alleged sale, named 12 March as the sale date; the notice as to the sale of the interest of Jonas Ricks named Tuesday, 12 March, 1907, as the sale date; 12 March, 1907, was on Tuesday, and the sale was made on the preceding day, 11 March, 1907. There was no advertisement or notice of a sale on 11 March, which was Monday. All the conveyances are duly recorded, and are admitted to be regular in form, and sufficient to convey the premises in question.

R. U. Brooks devised the interest in the land acquired by him under these deeds to the defendants, his children and heirs at law, and the defendants, in their answer, set up and allege title under the foreclosure deeds, and the will.

The plaintiff, in 1918, brought this suit and filed his complaint, claiming that he was still the owner of the one-ninth interest in the lands, and that defendants were claiming some interest unknown to him in the same, which constituted a cloud upon his title, and asked to have the same removed. The defendants answered, admitting that plaintiff once owned a one-ninth interest in the lands, but that they, through *mesne* conveyances from the plaintiff himself, were now the owners of the interest which had formerly belonged to the plaintiff.

The cause was tried by the court and a jury, and plaintiff offered in evidence the will of his father conveying to him the land, and the admission in the answer that he did acquire said interest through his father's will, and rested. The defendants offered in evidence the mortgage from plaintiff to Brooks Mercantile Company, the foreclosure deed to B. A. Brooks, and the deed from B. A. Brooks to R. U. Brooks, and it was admitted that defendants are the devisees of R. U. Brooks. The court then held that this shifted the burden of proof to plaintiff to "show by the evidence, and the greater weight thereof, that the foreclosure deed, which is regular and valid upon its face, is in fact inoperative as a deed,

or is operative in law only as an equitable transfer of the mortgage, as he alleges same to be." The evidence offered by the plaintiff to show that said deed was inoperative was admitted, as shown by the exceptions, over defendant's objections.

The jury found that the deed from the Brooks Mercantile Company to B. A. Brooks, and from him to R. U. Brooks, are void as to plaintiff, and the court held that they constituted only an equitable assignment of the mortgage given by plaintiff to the Brooks Mercantile Company. It was thereupon adjudged that the debt due by plaintiff be ascertained, and that, if it is not paid, the plaintiff's interest in the land be sold for its payment, etc. Defendant excepted and appealed.

F. S. Spruill and M. V. Barnhill for plaintiff.
E. B. Grantham and G. W. Taylor for defendants.

WALKER, J., after stating the facts as above: We may as well state in the beginning that this is not an action for the correction of a deed, or for its reformation, and the doctrine as to the quantity of proof required in such a case does not apply, and the contention of the defendant, in this respect, cannot be sustained. In an action for reformation it must be alleged and shown, by evidence clear, strong, and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties, because of a mistake common to both parties, or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud, or undue advantage something material has been inserted, or omitted, contrary to such agreement and the intention of the parties. *Ray v. Patterson,* 170 N. C., 226; *Newton v. Clark,* 174 N. C., 393. But this rule does not apply where the purpose is not to reform, but to set aside the instrument for fraud, undue influence, or upon other equitable ground. *Poe v. Smith,* 172 N. C., 67, and *Boone v. Lee,* 175 N. C., 383, citing *Harding v. Long,* 103 N. C., 1, and other cases.

The plaintiff asserts that the whole transaction was but a fraudulent attempt to deprive him of his land, and not a genuine and *bona fide* effort to foreclose the mortgage by sale under the power in order to pay the debt secured thereby. The relief asked and given was that the deeds, as conveyance of his interest in the land, be set aside or annulled, agreeing though that they are valid for the purpose of transferring the interest of the Brooks Mercantile Company, as mortgagee, or to subrogate the grantees in their deed to its rights as such. This is all that was done, except that the court ordered an account to be taken of the debt, and if it is not paid, that further relief be granted for its payment. But these deeds are void as to plaintiff, except as passing the right of the Brooks

Mercantile Company, upon another ground, because it appears that the sale of the land was advertised to take place on Tuesday, 12 March, when in fact it was made on Monday, the 11th of that month. The sale that was advertised never did take place, while the one that was actually made was not advertised at all; or, to put it in another way, the advertised sale was abandoned by failing to make it on the day named, while there was no notice given as to the one made on Monday, 11 March. Both the mortgage in this case, and the statute, Rev., 641, contemplated necessarily that the sale be made on the day named in the advertisement, otherwise there might not be any competitive bidding.

The following was held to be the law in *Eubanks v. Becton,* 158 N. C., 231, as stated in the syllabus:

1. When a power of sale is given in a mortgage, a strict compliance with the terms on which it is to be exercised is necessary; and when it is prescribed that the notice of sale be posted at the courthouse door and four other public places, a sale thereunder is invalid if the notice is posted at the courthouse door and three other public places. The effect of Rev., 641, was not before the Court in this case, and it was not construed.

2. A purchaser at a sale of lands under a mortgage with power of sale is a purchaser with notice of the terms under which the power of sale, as therein expressed, must be exercised, and his deed is invalid when the terms of sale of the mortgage antedating Rev., 651, are not in strictness pursued.

3. In order to waive an irregularity in the exercise of the power of sale contained in a mortgage, it is necessary that the acts alleged to be a waiver be committed with the knowledge of the one who does them; and a mortgagor after an invalid sale for failure of the mortgagee to strictly observe the terms thereof, without knowledge of the irregularity, does not waive it by subsequently renting the lands from the purchaser.

4. A deed of mortgaged lands made to a purchaser at a foreclosure sale, which is inoperative, is valid only as an equitable assignment of the note and mortgage, and the mortgagor, nothing else appearing, is entitled to an accounting.

That case resembles this one in several of its features. See, also, *Mayers v. Carter,* 87 N. C., 146; Wiltsie on Mortgage Foreclosure, 1 Vol. (3 ed.), sec. 318. The mortgagee's deed recites the fact that the sale was made on Monday, and this accords with the proof in the case.

As to the position taken by the appellant that the complaint does not state a cause of action, upon which he bases a motion, in this Court, to dismiss the case, we are of the opinion that a cause of action is stated, though defectively. There is a wide difference between the statement of a defective cause of action, that is, when no cause of action is stated,

and the defective statement of a cause of action. *Johnson v. Finch,* 93 N. C., 205; *Wilson v. Sykes,* 84 N. C., 215. In the latter case, if there is no request to have the pleading made more certain or definite, and no demurrer, the defective statement is waived, and if an answer is filed, the defect in stating the cause of action may be aided thereby if sufficient matter appear therein for the purpose. *Garrett v. Trotter,* 65 N. C., 430. We cannot grant the motion to dismiss, but, if necessary, would allow plaintiff to amend so as to conform the pleading to the facts proved, as such would not change substantially the cause of action. Rev., 507. In proper cases, we may dismiss in this Court, but this is not a case which calls for the exercise of the power. "The court or judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." 1 Pell's Revisal, sec. 509, and note, in which the cases are cited. Pleadings should be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. Rev., 495; *Blackmore v. Winders,* 144 N. C., 212; *Brewer v. Wynne,* 154 N. C., 467; *Muse v. Motor Co.,* 175 N. C., 466.

It was competent for plaintiff to attack any deed in defendant's chain of title as invalid in law, because of want of capacity or power to make it. *Mobley v. Griffin,* 104 N. C., 112; *Jones v. Cohen,* 82 N. C., 75; *Fitzgerald v. Shelton,* 95 N. C., 519.

This case has been tried upon its merits, and the plaintiff has won upon the facts. Defendant showed by his answer that he understood the cause of action, and has actually supplied the omission, if any, in the complaint. If he found it too meager in its allegations he had a remedy by asking that it be made more definite and certain by amendment. Rev., 496; *Blackmore v. Winders, supra; Allen v. R. R.,* 120 N. C., 550; *Conley v. R. R.,* 109 N. C., 692; *Oyster v. Mining Co.,* 140 N. C., 138. Instead of availing himself of the several remedies above mentioned, the plaintiff trusted his case to the jury upon the issue, and having had a fair chance to present it, his motion does not commend itself to our favorable consideration. He still has the right to foreclose the mortgage, which has been allowed to him by the order of the court, and he must be content therewith.

We find no error in the case, and affirm the judgment.

No error.

S. S. GAY, ADMINISTRATOR, v. WOODMEN OF THE WORLD.

(Filed 18 February, 1920.)

Insurance, Life— Fraternal Orders— Representations— Warranties— Actions—Statutes.

Rev., 4794, amended by ch. 46, Laws 1913, groups benevolent life insurance companies providing death benefits in excess of $300, in any year to any one person, as fraternal benefit associations, and those of $300 or less, as fraternal orders, and to the former, sec. 4795, relating to fraternal orders, does not apply, and hence fraternal benefit associations fall within the provision of sec. 4808, that statements or descriptions in the application for the policy are deemed representations and not warranties, which will not avoid a recovery, when untrue, unless material.

APPEAL by defendant from *Lyon, J.*, at January Term, 1920, of NASH.

The plaintiff, the beneficiary, seeks to recover upon a certificate issued upon the life of her late husband, by the defendant, a fraternal benefit association. The insured, in his application, stated he did not use and had never used opiates, morphine, cocaine, or other narcotics, and there was evidence tending to show that both before and after that date he had used those articles. The jury found a verdict in favor of the plaintiff for $600, with interest from the death of the insured. Appeal by defendant.

Finch & Vaughan for plaintiff.
Cowper, Whitaker & Allen and F. S. Spruill for defendant.

CLARK, C. J. Rev., 4808, provides: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy." In *Daughtridge v. R. R.*, 165 N. C., 193, the Court upheld this statute, citing numerous cases.

The defendant asked the court to charge that Rev., 4808, "has no application whatever to the defendant in this action, for that the defendant is a fraternal benefit society, and is not governed by the general regulations above cited, which apply only to the general life insurance companies." The court declined to so charge, and instructed the jury that said section did apply to this defendant, and the defendant excepted. This presents the only point in the case.

The defendant contends that Rev., 4794, provides that "Nothing in the general insurance laws, except such laws as are applied to *fraternal orders,* shall be construed to extend to benevolent associations, incorporated under the laws of this State that only levy an assessment on the members to create a fund to pay the family of the deceased member and

make no profit therefrom, and do not solicit business through agents." But that section does not apply to this defendant, which is not a fraternal order as defined in Rev., 4795, but is a "fraternal benefit society," for Rev., 4794 (above cited), was expressly amended by Laws 1913, ch. 46, by adding "Such benevolent association providing death benefits in excess of $300 to any one person, or disability benefits not exceeding $300 in any one year to any one person, or both, shall be known as 'fraternal benefit societies'; and those providing benefits of $300 or less shall be known as 'fraternal orders.'" The evident intent and effect of the act of 1913 was to group this defendant as a fraternal benefit society as distinguished from a fraternal society, which latter are restricted to those associations whose death benefits do not exceed $300. The societies like this providing benefits in excess of said amount are designated as fraternal benefit societies, and come under the general provisions of Rev., 4808, as the court charged.

Besides, the protection of the said section exempting fraternal associations from Rev., 4808, applies only to associations, in the language of the section, "incorporated under the laws of this State," whereas, the defendant is "incorporated under the laws of another State."

Under the plain provisions of the statute, we find in the instruction of the court

No error.

ENGLISH LUMBER COMPANY v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 18 February, 1920.)

1. Appeal and Error—Reference—Findings.

The findings of the court, when passing upon the report of a referee, are conclusive on appeal when based upon legal evidence.

2. Usury—Banks and Banking—Agreement—Deposits—Contracts.

Where the bank has followed an arrangement made by its depositor that the latter keep a certain per cent of the money borrowed upon his own paper and paper of its customers upon which he remains responsible, and which is good and collectible by the bank without trouble to it, and thus collects on the series of transactions a rate of interest in excess of the legal rate, the interest thus received is usurious and comes within the intent and meaning of the statute forbidding it.

3. Usury—Penalty—Limitation of Actions—Mutual Running Accounts—Statutes.

Where the bank, in following an agreement with its depositor, charges an usurious rate of interest upon loans made to him upon a continued series of transactions whereby it received at a certain discount upon the

commercial papers of its depositor received by him in the course of his business, but upon which the depositor remained bound, and the collection of which was without trouble to the bank, and the usurious rate was by reason of an agreement that he keep a certain per cent of the money borrowed from the bank on deposit there, the transaction constitutes a mutual running account, and an action for the penalty under our statute is not barred within two years next from the last item therein. Rev., 396 (2).

BROWN, J., dissenting.

APPEAL by defendants from *Ray, J.*, at the July Term, 1920, of BUNCOMBE.

This is an action to recover the penalty for usurious interests alleged to have been paid by the plaintiff to the defendant.

The defendant denied that usury was charged or paid, and pleaded the statute of limitations.

A reference was ordered, and upon the report being made, which was in favor of the defendant, exceptions were filed by the plaintiff, and upon the hearing the material findings of fact and conclusions of law of the referee were reversed, additional findings made by the court, and judgment rendered in favor of the plaintiff, and the defendant excepted and appealed.

It appears from the findings of fact made by the court that in 1909 the plaintiff was engaged in the lumber business, with its principal office in Asheville, and that in that year it began business with the defendant bank; that, on 20 March, 1909, it was agreed between the parties that a line of credit should be allowed to plaintiff by defendant bank on different classes of paper discussed, but each item in each class be subject to approval by defendant bank, of $20,000, which line of credit on the various classes was, by agreement between the parties, extended to more than $30,000, through the period of the transactions between the parties, and it was part of the agreement that the defendant bank would accept such of the plaintiff's paper, as it approved of various classes, to the extent of the line of credit agreed upon from time to time, the plaintiff being required to pay 6 per cent interest for such money as it borrowed, and being required by the agreement to keep in the bank 20 per cent of the amount of the loans obtained from the bank on its customers' notes discounted, and on the personal loans. It is found that the plaintiff did not keep an average of 20 per cent, in the bank, as agreed to, up to the beginning of the month of June, 1909, but it is found that in consequence of said agreement the plaintiff did keep and maintain a balance of the money so borrowed, and attempted to keep 20 per cent, and the exact amount not being ascertainable from this record, the defendant's estimate of not more than 6 per cent is accepted by this court; and the court finds that as much as 6 per cent monthly average was kept in said

bank in consequence of said agreement up to the 1st of June, 1911, and by agreement between the parties, on the complaint of the bank that the average promised was not left, the defendant bank actually charged the interest upon the deficit, the amount of which, for the different periods there shown, is in the sum of $216.65. That this agreement to maintain 20 per cent balance on loans related to direct loans to the plaintiff on its own paper, and on customers' notes discounted, but did not relate to demand loans on assigned accounts.

3. That the plaintiff opened an account and began business with the defendant bank in March, 1909, and began to discount its customers' notes or paper, pursuant to an arrangement made at the time with the defendant bank, and continued same thenceforward until it closed its business dealings with the defendant in 1913.

4. That said plaintiff, beginning about 2 September, 1909, and continuing thenceforward until the close of its business dealings with the defendant bank, borrowed money from the defendant on its assigned invoices, or accounts receivable, as collateral security, from time to time, as its necessities required, and as shown in Exhibit A, as corrected by agreement of the parties, and agreed to pay, and did pay, and the defendant bank did receive from the plaintiff, in addition to the six per cent charged for the loan of the money, a charge of one (1) per cent upon 50 per cent of the face value of said accounts receivable, or invoices, so assigned, handled, or collected by said bank, and continued to make and collect this additional charge from the date hereinbefore in this section mentioned, until January, 1910, when the charge was reduced to two-thirds of one per cent upon the face value of said assigned accounts receivable, or invoices, and said loans thenceforward were limited in amount to two-thirds of the face value of said accounts; that on a large portion of the transactions, as shown by Exhibit "A," to which this paragraph relates, the charge which was originally 1 per cent on the face of the invoice, and later two-thirds of 1 per cent, and was often greater than the interest expected or received; that the accounts were, in at least 90 per cent of the cases, promptly paid, were generally known and easily ascertained to be solvent, were guaranteed by plaintiff, and required very little if any more attention than collateral loans upon other classes of paper; and said agreement was proposed by the plaintiff in order to get the accommodation of the loan, and the loan was granted because of the profit derived from the charge of the commission, which was an unreasonable charge, and was an attempted device by which the bank would receive a greater than 6 per cent income from its loans as the condition for making such loans; that there were almost daily transactions in the nature of loans or credits allowed by the bank, taken up by substituted notes, substituted demand notes on customers' paper, all collateral, and

on discounted customers' paper, all covered by the agreement as to the line of credit, which line of credit agreed upon from time to time was kept exhausted by the plaintiff, transactions being of practically daily frequence, each party keeping the whole of the accounts, the mutual items being so interlocked as to make them practically inseparable. So that it was, and was assumed to be, an open mutual running account from 1 March, 1909, to the close of the transactions, the final settlement and payments being on 4 November, 1914.

There are other findings, but those set out are sufficient to a proper understanding of the legal questions presented.

The action was commenced more than two years after the date of most of the items in the account, and within less than two years from the date of the final settlement.

His Honor held that the account between plaintiff and defendant was a mutual running account, and that the statute did not begin to run until the last payment made by defendant.

R. S. McCall, Pless & Winborne, and Murray Allen for plaintiff.
Bourne & Parker and Theo. F. Davidson for defendant.

ALLEN, J. The findings of fact by the court are conclusive upon us as there is no exception that there is no evidence to support them (*Eggers v. Stanbury*, 177 N. C., 85), and they make out a case of usury against the defendant.

It is found as a fact that the charge of commissions of 1 per cent at one time, and two-thirds of 1 per cent at another "was an attempted device by which the bank would receive a greater than 6 per cent income from its loans as the conditions for making such loans," which comes directly within the authority of *Arrington v. Goodrich*, 95 N. C., 467, which holds that a commission charged for the purpose of securing more than 6 per cent interest was usurious, and the agreement requiring the plaintiff to keep on deposit a part of the money advanced, or to pay interest on the deficiency, in addition to a charge of 6 per cent interest, is expressly condemned in *Bank v. Wysong and Miles Co.*, 177 N. C., 388, where the principle is fully discussed with ample citation of authority in support of the opinion.

The remaining question is as to the correctness of the ruling on the statute of limitations, and this also is practically foreclosed against the defendant by the finding that there were "almost daily transactions in the nature of loans or credits allowed by the bank, taken up by substituted notes, substituted demand notes on customers' paper as collateral, and on discounted customers' paper, all covered by the agreement as to the line of credit, which line of credit agreed upon from time to time was kept exhausted by the plaintiff, transactions being of practically

daily frequency, each party keeping the whole of the accounts, the mutual items being so interlocked as to make them practically inseparable. So that it was, and was assumed to be, an open mutual running account from 1 March, 1909, to the close of the transactions, the final settlement and payments being on 4 November, 1914."

This brings the accounts between the plaintiff and defendant within the definition of a mutual running account as contained in *Hollingsworth v. Allen,* 176 N. C., 630, and other cases, and the statute of limitations does not begin to run on such accounts except from the last item in the account. *Green v. Caldcleugh,* 18 N. C., 323; *Stokes v. Taylor,* 104 N. C., 399; *Stancell v. Burgwyn,* 124 N. C., 71.

The principle is applicable to statutes of limitations generally, and, as there is no exception of an action to recover the penalty and as the right to bring such action is controlled by our statute of limitations (Rev., 396, subsec. 2), which provides that "an action to recover the penalty for usury" shall be brought within two years, it must be held that it applies to such actions, and it has been so held in other jurisdictions.

In Webb on Usury, sec. 209, the course of dealing between the plaintiff and defendant is described with much accuracy, and the conclusion reached that the lapse of time is not a bar. The author says: "In all cases regard must be had for the statute of limitations, which, as will be seen, upon subsequent pages, may determine all the rights of the parties to the contract, including the debtor's right to apply his payments. But neither lapse of time nor the statute of limitations will affect a case where the transaction was a continued one. 'New dealings, new advances, new securities for money, mortgages upon the estate of the complainant, and some of the claims outstanding and unsettled, at the time of filing the bill, when taken together make out a case which neither time nor the statute of limitations can affect."

Again, in *Slover v. Bank,* 115 Tenn., 347: "The bill was filed to collect usury upon a series of transactions on the 20th of March, 1905. It charges that the last usurious interest was paid on the 1st of March, 1901, and that there was a final settlement between the parties on the 4th of March, 1902, of all the transactions between them involving the usury.

"There was a demurrer filed, relying upon the statute of two years and the statute of six years; and it is insisted in this court that the demurrer should have been sustained on the ground that the action was barred by the statute of two years.

"There being a series of usurious transactions, the statute of limitations would not begin to run until these transactions were closed; and a settlement was made between the parties on the 4th of March, 1902."

In *Pickett v. Bank,* 32 Arkansas, 347 (at page 355), it appeared that the firm of Wormley, Joy & Company, of which Pickett was a member,

had opened a bank account with the Merchants National Bank of Memphis, with whom they had a running account for moneys loaned and checks paid, and credits for deposits and payments. The court held that this account, which commenced in 1866 and continued to 1868, constituted but one transaction. In the opinion in this case it is said: "So held under like circumstances by the Supreme Court of Tennessee in the case of *Weatherhead v. Boyers,* 7 Yerger, 545, and *Poyers v. Boddie,* 3 Hum., 666. In the first mentioned case *Mr. Justice Peck* said: 'The transaction was a continued one, new dealings, new advances, new securities for money, . . . when taken, make a case where neither time nor the statute of limitation can have effect.' The defense was usury, the precise question as to the time when the statute bar commenced, the transaction of advancements, payments, and settlements, extended for several years, and was held to be one transaction."

We therefore conclude that the cause of action is not barred..

Affirmed.

BROWN, J., dissenting: I cannot agree with my associates upon the judgment rendered, as I am of the opinion that the penalties recovered in this case are barred by the statute of limitations.

G. E. GOFF, ADMINISTRATOR OF D. C. GOFF, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 25 February, 1920.)

1. Railroads—Negligence—Signals—Crossings—Collisions.

The failure of the engineer on the locomotive of a railroad train to ring the bell or blow the whistle or give other warning as the fast moving train approached a grade crossing with a much used street in a populous town, where the approaching train was obscured from the view of those using the highways, is evidence of actionable negligence in an action to recover damages brought by one who was injured by a collision with the train while attempting to cross the track.

2. Railroads—Crossings—Signals—Evidence—"Look and Listen"—Contributory Negligence—Negligence—Nonsuit—Trials.

Testimony of witnesses in circumstances and position to have heard the warnings given by whistle and bell, etc., of the locomotive of a train approaching a grade crossing, that they did not hear such warnings, is sufficient to sustain a verdict that they were not in fact given, and a judgment will be sustained in plaintiff's favor with this and with other evidence tending to show that the locomotive to defendant's train collided with the intestate's automobile and killed him, on a much used grade crossing in

a populous town, where the approaches of the public road were narrowed by ditches, the view of the railroad track obstructed by trees, bushes, and houses so that the train could neither have been seen nor heard by the intestate, and the burden of proof being on defendant to show the contributory negligence in failing to observe proper care before going on the track, a motion for a judgment as of nonsuit is properly denied.

3. Railroads— Crossings— Collisions— Negligence— Contributory Negligence—Subsequent Negligence—Evidence—Nonsuit—Trials.

Where there is evidence tending to show that the defendant's locomotive struck an automobile in which the plaintiff's intestate was crossing the railroad track at a grade crossed by a street in a city, and there is further evidence tending to show that the engineer did not know until after the impact he had carried the automobile some 250 or 300 yards, with the intestate therein, apparently alive and unharmed, and that his death was then caused by the automobile striking a signal post along the right of way, it is sufficient to take the case to the jury upon the question of the defendant's negligence causing the death after the collision at the crossing irrespective of the negligence of the defendant and contributory negligence of the intestate at that time, or previous thereto, and a motion as of nonsuit is properly overruled.

CLARK, C. J., concurring.

APPEAL by defendant from *Devin, J.*, at the November Term, 1920, of EDGECOMBE.

This is an action to recover damages for the negligent killing of plaintiff's intestate, D. C. Goff, at the public crossing in Rocky Mount at Gay's store on Cokey Road.

The allegations of negligence are that the defendant allowed trees and bushes to grow on its right of way, and failed to give the signals to travelers required at crossings by ringing the bell and blowing the whistle or otherwise, at the proper time, in order to warn the travelers of the approach of the train, and caused plaintiff's intestate to enter on the right of way with his car in motion, and to undertake to cross over said railroad, and negligently caused said train to pass over said crossing at an excessive, rapid, reckless, and unusual rate of speed, to wit, more than 50 miles an hour, and without keeping any lookout on part of its engineer and fireman; and after plaintiff's automobile was stricken by the engine of said train it was negligently carried, with plaintiff's intestate in same, over 300 yards on front of said engine until it struck a switch post standing close to the track, when said automobile and plaintiff's intestate were hurled violently to the ground and plaintiff killed; that the engineer and fireman failed to keep a proper lookout for the protection of travelers on said road passing over said crossing, and that if they had kept a proper lookout they could have seen said automobile as it reached the crossing, and was picked up by the engine, and avoided carrying same until it struck a switch post and violently hurling the auto and plaintiff's intestate to the ground and killing him.

The defendant denied that it was negligent, and pleaded that the death of the plaintiff's intestate was caused by his own contributory negligence.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was overruled, and the defendant excepted.

The defendant also excepted to the submission of the third issue to the jury upon the ground that there was neither allegation nor proof to support it.

The defendant also excepted to the charge of the court upon the third issue upon the ground that there was no evidence that the intestate was not mortally injured by the collision at the crossing.

The defendant also excepted because of refusal to give the following instruction to the jury: "The burden is on the plaintiff to satisfy you by the greater weight of the evidence that the deceased, before attempting to cross the railroad, listened and looked in both directions to ascertain if a train was approaching; so if the plantiff has not satisfied you that the deceased did listen and look in both directions for an approaching train before attempting to cross the track, you are instructed to answer the issue as to contributory negligence 'Yes.'"

The jury returned the following verdict:

"1. Was plaintiff's intestate killed by negligence of defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did plaintiff's intestate, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: 'No.'

"3. Was the death of plaintiff's intestate caused by the negligence of the defendant in failing to stop its train in time to prevent the automobile from being thrown against the switch post, after said automobile had been struck by the engine, as alleged in the complaint? Answer: 'Yes.'

"4. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: '$18,000.'"

Judgment was entered upon the verdict for the plaintiff, and the defendant excepted and appealed.

J. B. Ramsey and W. O. Howard for plaintiff.

F. S. Spruill and John L. Bridgers for defendant.

ALLEN, J. The motion for judgment of nonsuit is upon the ground, (1) that there is no evidence of negligence; (2) that the plaintiff's intestate was guilty of contributory negligence in any view of the evidence.

If the first position can be maintained, the defendant is entitled to a reversal of the judgment, but the same result does not necessarily follow if the plaintiff's intestate was guilty of contributory negligence, because

it has been found in answer to the third issue that whether plaintiff's intestate was negligent or not, the defendant could have avoided killing the deceased but for its negligent failure to stop after the automobile was struck, and caught on the front of the engine.

Is there evidence of negligence? In *Bagwell v. R. R.*, 167 N. C., 615, the Court quotes with approval the following from *Edwards v. R. R.*, 132 N. C., 100: "It is undoubtedly true that the engineer must give such signal as will be reasonably sufficient to warn persons on highways that intersect the track of the coming of the train, and this must be done by ringing the bell or blowing the whistle, as the peculiar circumstances of the case may suggest to be the proper method, and the failure of the engineer to give such signal would be evidence of negligence. *Hinkle v. R. R.*, 109 N. C., 473; 26 Am. Rep., 581. The warning must be reasonable and timely, but what is reasonable and timely warning must depend upon the conditions existing at the time in the particular case, and we are not by any means prepared to say that the law requires in every case that the signal should be given in any special way. We know of no such hard and fast rule as that laid down by the trial judge in this case. The bell and the whistle are the appliances provided for the purpose of giving signals, and one or the other, as the case may seem to require, must be used for that purpose, and, in cases of emergency or when the peculiar situation seems to demand it, there should perhaps be a resort to the use of both; but it must be left to the jury to decide, upon proper instructions of the court as to the law, what is the proper signal in any given case."

It was also held in *Edwards v. R. R.*, 129 N. C., 79, "That the testimony of a witness that he did not hear either the whistle or the bell, although in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury. It *tends* to prove that neither the whistle nor the bell was sounded; but whether it *does* prove it is for them alone to decide."

Applying these principles, the plaintiff was entitled to have his cause of action considered by the jury.

The plaintiff's intestate was driving his automobile at a moderate rate of speed on the Cokey public road, which crosses the railroad of the defendant within the corporate limits of Rocky Mount, and as he attempted to cross the track he was stricken by the train and injured.

One witness testified: "A man coming up to the crossing and car moving he could not turn to either side; there are ditches on both sides. I have seen cars have wrecks there on both sides to keep out of way of trains. Rocky Mount has about 21,000 people. This crossing is in the town limit; is built up about there. I guess built up about four blocks towards Tarboro. The crossing is used a whole lot. Two main roads

across it; somebody crossing most of the time; all the county south side Norfolk-Carolina and east of W. and W. Railroad; this is the only crossing in this section."

J. O. Joyner, who was at Gay's store, within 100 feet of the crossing, testified: "Did not hear any whistle; bell was not ringing; didn't see train until after it struck auto."

Jesse Calhoun, also at Gay's store, says: "Don't remember hearing any signal." Frank Carter, who was at his home, 150 feet from crossing: "Didn't hear it blow. I can hear train blow at crossing at my house. Has blown heap of times when I didn't hear it." Mrs. Moore, within 100 yards of crossing: "I noticed the train coming at extra speed. Didn't hear whistle blow."

W. H. Gay: "I was in store; I guess store is about 10 steps from right of way. Did not hear any signal of train; heard the smash, and saw auto wheel rolling between spur track and railroad; kinder in direction train was going."

This was sufficient to be submitted to the jury on the question of the failure of the defendant to give any notice of the approach of its train to a much-used public crossing, and if it failed in the performance of this duty it was guilty of negligence.

There is also evidence that no proper lookout was maintained.

The fireman on the engine testified that he saw the intestate approaching the track, driving about eight miles an hour, and that he said nothing to the engineer until after the collision, and a witness testified he heard the engineer say "he didn't know he hit any one until car struck switch," which was 300 or 350 yards beyond the crossing.

There is evidence of contributory negligence, in that the intestate, by the exercise of proper care, could have heard the roar of the train, or could have seen it in time to stop before entering upon the track, but it is not so conclusive that it can be declared as matter of law.

The principles applicable to this phase of the case are accurately stated in *Johnson v. R. R.*, 163 N. C., 443.

"4. On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective. *Cooper v. R. R.*, 140 N. C., 209; *Coleman v. R. R.*, 153 N. C., 322; *Wolfe v. R. R.*, 154 N. C., 569, in the last of which cases the rule was applied to an employee charged with the duty of watching a crossing and warning travelers of

the approach of trains, and he was required to exercise due care, under the rule of the prudent man, for his own safety by looking and listening for coming trains.

"5. The duty of the traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence, by not taking proper measures for his safety, to be submitted to the jury. *Sherrill v. R. R.*, 140 N. C., 255; *Wolfe v. R. R., supra.*

"7. If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received. *Mesic v. R. R.*, 120 N. C., 490; *Osborne v. R. R., supra,* 160 N. C., 309."

One witness described conditions on the day of the accident: "There is a good scope of woods before you get to the railroad. There is a good lot of buildings at crossing. If a train happened to be close by you could see it when you first got to the buildings. That is a map of the crossing, the road curves a little to the right going into Rocky Mount. Several houses alongside the country road, see map, about six. You could see right here, indicate on the map, if along there would have to see the train in front, before reaching the right of way, would have to see between the buildings, but the train would be ahead of him going west, there is a lumber shed, boiler room, stable, warehouse, and Gay's store, indicates on map, explain map to jury, the map does not show bushes, ditches, and trees, unless he could catch the train between there, those narrow spaces, he could not see it at all, he would be right on the train before he could see it. The sweet gum bushes are right smart higher than my head; they were (as high) as my head then. A traveler coming on the right of way after he had cleared the bushes and got a clear view of the train coming, could not turn to the right or left; there were ditches along there; there was a ravine on each side of the road."

Another witness: "Between Cokey road and right of way of railroad one-quarter of a mile, three dwellings, storage house, lumber and boiler room, and stables further down in edge of woods, pointed houses on map, they obstruct view of railroad. In space between Cokey road and railroad right of way, trees, shrubs and large trees growing; a ditch runs across the crossing, and it has some growth on it. On the right of way the crossing is narrow, wide enough for two to pass in vehicles; ditches on each side of the crossing. I estimate two or three feet deep."

Another witness: "Good many buildings between road and right of way; very hard to see train; have to catch glimpses between buildings; traveler could not catch sight of train until he had passed lower building and got on right of way; there are some bushes, some high as the house, between Dozier and Thorne's storage house and the railroad track; there is a ditch there on the right of way; I don't think that they have ever crossed the ditch and cut any trees down; right of way is clear between ditch and railroad."

W. L. Dunn testified: "There are some buildings and mill along the track, and I think they would cut off from a person going to Rocky Mount the sound of a coming train; don't think you could hear it unless it blowed."

The inference is permissible from this evidence that the view and hearing were so obstructed that the intestate could not see or hear the approaching train in time to avoid the collision by the exercise of ordinary care, and if so, the question was for the jury.

If, however, the intestate was negligent in entering upon the track without looking and listening, this would not bar a recovery because of the finding on the third issue, which is supported by allegation and proof.

The plaintiff alleges that the defendant "could have seen said automobile as it reached the crossing and was picked up by the engine and avoided carrying said automobile of plaintiff's intestate, with plaintiff's intestate in same, more than 200 yards, and violently hurling said automobile and plaintiff's intestate to the ground, and thereby avoided killing him; that the said engineer and fireman negligently failed and omitted to keep any lookout at all, and did not know of the collision until plaintiff's automobile, with plaintiff in same, had been carried more than two city blocks, and until the automobile struck a switch post, and plaintiff's intestate and his automobile were hurled to one side, and made no effort whatever to stop said train until said switch post was stricken by said automobile."

Frank Carter testified: "At the time of accident I was standing on end of front porch next to the railroad. I went out to look at the train. I saw a man sitting in the car on the pilot of the engine, and about that time it threw the car off, and threw the man up as high as the engine; the man's back was towards me like he was holding the steering wheel of the car. If the man had been going towards Rocky Mount and crossing from the south to the north the position he was sitting was the natural position; when the train got to the switch it threw the car off; one end got on the switch and it threw the man about as high as the engine. He was laying in the path at the end of the crossties when I got there. After the auto struck the switch, the train stopped in less than a car length of the whole train. Speed of train was

35 or 40 miles an hour. I didn't see train at Cokey crossing; don't think it slackened; didn't act like it; didn't hear any brakes applied."

T. J. Bullock says: "Heard engineer say train was a little late; said he didn't know anything was on cow catcher until he struck switch post, and then he began to slow up."

There was also evidence that it was a light train, and that the switch post was 300 or 350 yards from the crossing.

This evidence justifies the findings, incorporated in the third issue; that the intestate was not killed at the crossing; that his car was struck and carried on the front of the engine 300 or 350 yards to the switch post; that during this time the intestate was sitting in his car with his hand on the steering wheel; that the car struck the post and the intestate was then killed; that the engineer did not know anything was on his engine; that he did not slacken speed until he struck the post, and that if he had been keeping a proper lookout he would have known of the collision at the crossing and could have stopped the train before it reached the post, and thus have avoided killing the deceased.

There is an exception to a charge upon the third issue upon the ground that there is no evidence the intestate was not killed at the crossing, which is covered by what has already been said.

The prayer for instruction on contributory negligence could not have been given, because it placed the burden on the plaintiff, when the law requires the defendant to plead and prove contributory negligence.

There is no exception to the amount of damages assessed.

No error.

CLARK, C. J., concurs in the opinion of *Allen, J.*, and further says: Any collision between a train and a vehicle of any kind at a crossing is *prima facie* negligence on the part of the company. The public have a right to use their roads, and the right of the railroad to cross is in subordination thereto. The population of the country is increasing steadily, and in addition to the ordinary vehicles there are now more than 100,000 automobiles and motor trucks licensed by this State, besides a large number from other States passing through this State. It is not reasonable to expect that this immense volume of business can cross and recross the railroad tracks of this State without frequent loss of life or personal injuries. It is therefore negligence on the part of the railroad not to abolish all grade crossings and to make their crossings of public roads in every instance either above or below the surface except when for sufficient cause the Corporation Commission may authorize gates and a tender at exceptional crossings.

Whenever death or personal injuries occur at a crossing it is *prima facie* due to the negligence of the railroad company in crossing the public road upon the same grade. The burden should be upon the company

to prove that notwithstanding its negligence in maintaining a grade crossing, the death or injury would not have occurred but for the conduct of the party killed or injured.

Throughout Europe grade crossings are forbidden, and they have been abolished in Massachusetts, Connecticut, New York, New Jersey, and some other States. The U. S. Supreme Court has held that any State can require this to be done at the expense of the corporation. Our own statute, Rev., 1097 (2), confers upon the Corporation Commission power "to require the raising or lowering of a track at any crossing where deemed necessary." This was reënacted and emphasized, Laws 1907, ch. 469, sec. 1 (c).

The laws and the courts are not solely for the protection of property rights, but for the enforcement as well of the constitutional guarantee of the protection of life and limb.

This Court accordingly held, in *Greenlee v. R. R.*, 122 N. C., 977, and *Troxler v. R. R.*, 124 N. C., 189, that the absence of automatic car couplers was negligence *per se*, and hence an irrebuttable presumption. This negligence has now been made punishable by act of Congress, 3 U. S. Compiled Statutes, 3174.

This Court made a similar ruling as to the failure to adopt a "block system." *Stewart v. R. R.*, 137 N. C., 687, which was reiterated in the same case, 141 N. C., 253, and such system is now required by statute. Laws 1907, ch. 469, sec. 1 (b). There are other similar decisions of this Court as to other matters involving exposure to unnecessary dangers. The longer retention of grade crossings should be on the same footing as the lack of car couplers and block systems. As *Lord Chancellor Erskine* observed, when at the bar, "Morality comes in the cold abstract from the pulpit, but men smart practically under its lessons when juries and judges are the teachers."

The General Assembly can make the abolition of grade crossings by railroads imperative instead of leaving it, as now, unexercised in the discretion of the Corporation Commission, and can place the cost of doing so upon the corporations, whose duty it is to remove them. *R. R. v. Minn.*, 208 U. S., 583, cited *R. R. v. Goldsboro*, 155 N. C., 362. In the meantime, like any other collision, or a derailment, the act itself is *prima facie* negligence on the part of the railroad company. *Marcom v. R. R.*, 126 N. C., 200.

This matter has heretofore been called to the public attention in *Cooper v. R. R.*, 140 N. C., 228-9; *Wilson v. R. R.*, 142 N. C., 348-9; *Gerringer v. R. R.*, 146 N. C., 35-37; *R. R. v. Goldsboro*, 155 N. C., 360-362, 364 (affirmed on writ of error, 232 U. S., 548); *McMillan v. R. R.*, 172 N. C., 857-860 (where the matter is fully discussed with full citation of authorities), and *Borden v. R. R.*, 175 N. C., 179.

F. C. CLEMENTS v. THE SOUTHERN RAILWAY COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS.

(Filed 25 February, 1920.)

1. **Summons—Service—Local Agent—Director General—Federal Statutes Principal and Agent.**

   Service of summons upon the local agent of a railroad company is sufficient on the company, and it is also sufficient upon the Director General of Railroads whether the Director General is regarded as holding analogous position to that of a receiver or as otherwise in charge of such companies under the intent and meaning of ch. 418, sec. 1, of the act of Congress of 29 August, 1916, and the proclamation of the President on 20 December, 1917, made in pursuance thereof.

2. **Same—Nonsuit—Dismissal of Action.**

   The carrier corporation can be sued jointly with the party operating its plant, whether the latter is a lessee, receiver, or Director General, and when sued jointly it is error to nonsuit the owner company, or to dismiss the action as to it.

3. **Appeal and Error—Objections and Exceptions—Motions to Dismiss—Actions—Judgments Final.**

   Upon the refusal of a motion to dismiss an action the movant should enter his exceptions and appeal from a final adverse judgment, but the allowance of the motion is final, permitting the adverse party to appeal.

APPEAL from *Connor, J.*, at August Term, 1919, of WAYNE.

This action was brought by plaintiff against the Southern Railroad Company, and W. D. Hines, Director General of Railroads, for personal injuries sustained 20 December, 1918. The summons was served by reading and delivering a copy to W. B. Devlin, "the local agent" of the Southern Railroad Company at Goldsboro, N. C. That company entered a special appearance before the clerk of the Superior Court, and moved for the dismissal of the action as to that company on the ground that W. B. Devlin was not agent of said company because its property was under the control and management of the Director General, Hines. The clerk denied the motion, and the company appealed. At the August Term, 1919, of Wayne, *Connor, J.*, overruling the action of the clerk, dismissed the Southern Railroad Company as a party defendant, and the plaintiff appealed.

Hood & Hood for plaintiff.
J. L. Barham for Southern Railroad Company.

CLARK, C. J. The refusal of a motion to dismiss an action is not appealable, but the defendant should enter his exceptions and appeal from the final judgment, should it be against him, *Johnson v. Reformers,* 135 N. C., 387, and numerous other cases cited 1 Pell's Rev., 313.

But the allowance of a motion to dismiss is final, and of course appealable.

The plaintiff, while operating, as locomotive fireman, a switching engine of the defendant company, and in obeying the orders of the engineer in charge thereof, and by reason of defective appliances, was severely injured, losing his left leg at the knee joint and his right leg 5 inches above the ankle, incurring great expense and intense mental anguish and physical pain, and being hopelessly injured for life.

Whether the defendant company was then being operated by the Director General as the representative of the lessee or as a statutory receiver, in either event the defendant company was under the control and management of the Director General by authority of law, and was a proper party. *Logan v. R. R.*, 116 N. C., 940, and *Hardin v. R. R.*, 129 N. C., 354.

Service upon the local agent was service upon the Director General, and also upon the company as represented by him. *Hollowell v. R. R.*, 153 N. C., 19; *Grady v. R. R.*, 116 N. C., 952.

The plaintiff could not be deprived of his right of action against the company whose engine he was operating because the road was temporarily, but by lawful authority in the control and management of a lessee, or a receiver. The plaintiff had nothing to do with that matter. The receipts and expenses of the operations will be adjusted between the company and lessee or receiver when the accounts are settled, and the road will now soon be returned to the company in all probability.

Congress by ch. 418, sec. 1, ratified 29 August, 1916, provided: "The President in time of war is empowered . . . to take possession, and assume control of, any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Pursuant to said act, on 20 December, 1917, the President issued a proclamation wherein he recited, "And whereas, it has now become necessary, in the national defense, to take possession and assume control of certain systems of transportation, and to utilize the same, to the exclusion, as far as may be necessary, of other traffic thereon for the transportation of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war." He then authorizes the War Department to take possession and assume control of them. The President further provides in said proclamation, "Except with the prior written assent of said Director, no attachment by *mesne* process or on execution shall be levied on or against any other property used by any of said transportation systems in the

conduct of the business as common carrier; but suits may be brought by and against said carrier, and judgments rendered as hitherto, until and except so far as said Director may, by general or special orders, otherwise determine." This was to prevent plaintiffs in such cases being barred by the lapse of time or the death of witnesses.

On 21 March, 1918, Congress passed an act for the operation of transportation systems while under Federal control, sec. 10 of which provides that *"carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws, or at common law,* except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President. *Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law, and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.* Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control, or of any act of Congress or official order or proclamation relating thereto, shall, upon motion of either party, be transferred to the Court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control. . . ." U. S. Comp. Stat. (1918), sec. 3115 3/4 J.

In *Hill v. Director General,* at last term, 178 N. C., 609, *Hoke, J.,* said: "The defendant, the Director General, must be considered a party only as being in the management and control of the defendant railroad." This being so, he is simply in effect a statutory receiver, appointed by the President under authority of the act of Congress.

When a receiver is appointed by authority of a State statute, he is simply, in like manner, "to be considered a party only as being in the management and control of the defendant railroad." To the extent and in the cases authorized by the statute the judge places him in the charge of the property of the defendant. In what cases and to what extent the judge shall appoint receivers, and the scope of their powers, varies in different States, and in the same State, according to the statute at different times. There is no magic or peculiar power in his being styled "receiver." The substantial fact is that either by decree of a judge acting by authority of law, as in the case by appointment of the President, acting by authority of an act of Congress, some one is placed "in the management and control of the defendant railroad," in the cases and for the reasons and purposes prescribed in the statute.

The person so acting, whether he is called a receiver, or a Director General, is a party, not individually, but in that representative capacity, and the corporation is sufficiently served with process whether it is served upon a "local agent," or upon the receiver himself, for the "local agent" under our statute, Rev., 440, is designated as a proper party upon whom to make the service.

In the statute above quoted it is provided: "Carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act, or any other act applicable to such Federal control, or within the order of the President." It would seem, therefore, that the Southern Railroad Company is liable to be sued for the personal injuries sustained by the plaintiff, for under the statute ratified 29 August, 1916, the President issued his proclamation, which provides that no attachment by *mesne* process, or an execution, shall be levied against any property of a railroad, "except with the prior written assent of the Director; but *suits may be brought by and against said carriers and judgments rendered as hitherto,* until and except so far as said Director may, by general and special orders, otherwise determine." As such suits may be brought by and against said carriers, and judgments rendered *as hitherto,* it would seem to follow that service can be made as heretofore upon W. B. Devlin, "local agent," who was and still is "local agent" of the Southern Railway Company at Goldsboro. He is not the less, either in law or fact, filling that position because under the authority of the act of Congress the President has appointed the Director General as a statutory receiver with the most complete powers to "take possession, use, control, or operation of" the Southern Railroad, among others.

There is no question here arising as to the enforcement of the judgment when it shall be obtained, but the Southern Railroad Company is merely served with summons, which will give notice to it as well as to the Director General, that such claim is being prosecuted against the defendant company, which is thus afforded opportunity to contest the claim, and it has appeared in this case, by its counsel.

The sole question presented is whether service can be made upon the Southern Railroad Company while in the hands of the statutory receiver, as could have been done if he had been a receiver appointed by a judge, in such cases as are provided by a Federal or a State statute. If service upon the Director General himself would have been sufficient service upon the corporation as it would be in the case of a receiver, then service upon the station agent under him would be sufficient service under the provision that "suits may be brought by and against said carriers . . . as hitherto." This evidently means in such manner and in such cases as heretofore.

"It was proper to sue the receivers of a railroad company alone, or to join them as defendants with the company in an action for injuries, though the cause of action arose before their appointment." *Hollowell v. R. R.*, 153 N. C., 19.

"Service of a summons upon the receivers of a corporation is service upon the corporation itself as fully as if made upon the president and superintendent, and service upon the local agents of the receivers has the same legal effect as if made upon the receivers personally." *Grady v. R. R.*, 116 N. C., 952.

In *Owens v. Hines, Director General,* 178 N. C., 325, it was held that in an action to recover from the carrier, on any liability (except for fines, forfeitures, and penalties, which must be brought against the carrier alone), the summons must be served upon the Director General, and service on him was sufficiently made by serving the summons upon W. B. Devlin, the "local agent" of the company, but serving under his orders.

While the judgment, if obtained, cannot be collected out of the property of the defendant company, without the prior consent of the Director General, it would be a great hardship upon the plaintiff, suing for grave personal injuries, if he was debarred of an action against the company until it should become out of date or his witnesses should die or remove. It is no hardship upon the defendant company, but to its advantage, that it should be joined as a party defendant and have opportunity to be represented by its own counsel, more conversant probably with the facts than the counsel of the Director General.

The subject has been much illuminated by the following cases in the Federal Courts. In *Johnson v. McAdoo, Director General,* 257 Fed., 757, it is held: "Under act 21 March, 1918, litigants can sue railroad companies under Federal direction, just as they were previously able to do, and in such courts as had jurisdiction under the general law," and further, "It is incumbent on the Director General to defend a suit against a road and make payment in the event of recovery out of his receipts: the question of adjustment as between the Government and the railroad will come up for settlement when the roads shall be returned to their owners or otherwise disposed of." This is exactly in point in this litigation.

In *Jensen v. R. R.,* 255 Fed., 795, it is held that "The provision in General Order No. 50 that pleadings in pending actions for injuries against a railroad company 'may' be amended by substituting the Director General and dismissing the company as defendant must be construed as permissive only, in view of the Federal Control Act, providing that carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, and that 'actions may be brought

against them and judgments rendered as now provided by law.'" In that opinion the Court says: "Congress clearly meant by the term 'carriers' the corporations themselves, and that the right to sue them must remain certainly until it is changed by some valid provision."

In *Rutherford v. R. R.*, 254 Fed., 880, the Court holds that under the act of 21 March, 1918, ch. 25, sec. 10, the Director General is a carrier, *his position being analogous to a receiver.* There are other decisions, all of them along the above lines.

The above act of 1918, ch. 25, "To provide for the operation of transportation systems while under Federal control for the just compensation of their owners, and for other purposes," authorizes the president "to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time, in reasonable installments for each year, and pro rata for any fractional year of such Federal control not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ending 30 June, 1917."

There are also other provisions for maintenance, repairs, etc., and for other compensation, and a provision by which the *carrier shall accept the terms and conditions* of this act, which this defendant company, and it is believed that all other railroad companies did.

There are other provisions very much in detail making a most complete lease between the Government and the carriers, including a revolving fund of $500,000,000 placed in the President's hands to provide for deficiencies in receipts. Therefore, the attitude of the parties is that of lessor and lessee, and the defendant company is liable to be sued jointly with the Director General, representing the lessee, as laid down in *Logan v. R. R.*, 116 N. C., 940, and *Harden v. R. R.*, 129 N. C., 354, and citations to those cases in Anno. Ed.

But if the position of the parties was that the Director General is a statutory receiver, as said in *Rutherford v. R. R., supra*, service upon the local agent was equally service upon the corporation and on the Director General under the authorities herein cited.

The order setting aside the service, therefore, because the summons was read to and a copy left with W. B. Devlin, the "local agent" at Goldsboro, instead of upon the Director General himself, must be

Reversed.

A. C. BECK v. WILKINS-RICKS COMPANY.

(Filed 25 February, 1920.)

1. Bailment—Garage—Automobiles—Ordinary Care—Negligence.

The defendant owner of a garage, who has received the plaintiff's automobile for repairs, is regarded as a bailee, and is not liable for the failure to return the property in good condition when he has observed the ordinary care devolved upon him by his bailment.

2. Same—Burden of Proof—Res Ipsa Loquitur—Evidence—Nonsuit—Trials.

Where the owner of a garage receives an automobile for repair, and it is destroyed by fire in the garage after the owner had called for it at the time specified, but kept longer therein for the garage man to repair it, in his action for damages the owner of the automobile has the burden of proving, throughout the trial, that the damage was caused by the defendant, but having shown the destruction of his machine by fire, as stated, the defendant must go forward with his proof to rebut the *prima facie* case established, under the doctrine of *res ipsa loquitur*, and a judgment as of nonsuit upon plaintiff's evidence will be denied.

ALLEN, J., dissenting.

APPEAL by plaintiff from *Connor, J.*, at September Term, 1919, of LEE.

Action for damages for the destruction of an automobile while in the defendant's garage for repairs. It was in evidence that the plaintiff carried his car to the garage for certain minor repairs, and was to call for it at noon, it being understood that he would need it at that time. When he called for it at that time he was told that it would take only a short time longer, not more than 30 minutes. The plaintiff then stated that he would call for it when he came back from dinner, but being delayed, he went at 5 p.m. and found his automobile torn down and the defendant's employees grinding the valves, which had not been authorized by plaintiff. The answer admits that the machine was not in such condition that it could be removed that afternoon. It is alleged in the complaint and admitted in the answer that during that night the building was destroyed by fire and the car with it. The complaint alleges the liability for negligence, and also for departure from the terms of the bailment, and also a promise to pay by the company after the destruction of the machine. At close of plaintiff's evidence the court sustained a motion for judgment as of nonsuit, and the plaintiff excepted and appealed.

E. L. Gavin, Williams & Williams, and Hoyle & Hoyle for plaintiff.
Seawell & Milliken for defendant.

CLARK, C. J. The defendant, as bailee, assumed liability of ordinary care for the safe keeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable for the nonreturn of the property in good condition, if he observed the ordinary care devolved upon him by reason of the bailment. If the machine had been injured, or stolen, or destroyed by fire while in his custody, the defendant would not be liable if such care had been observed. On the other hand, the mere fact that the property had been destroyed by fire or stolen did not absolve him from responsibility, any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had used the care required of him by virtue of his bailment. The burden of proving negligence was on the plaintiff, and this burden does not shift, but when it was shown, or admitted, that the machine was not returned by reason of its being destroyed, or stolen, or that it was returned in injured condition, it was the duty of the defendant "to go forward" with proof to show that it had used proper care in the bailment. Therefore, it was error for the court to withdraw the case from the jury, and thus to hold, as a matter of law, that the defendant had exercised proper care.

The law is admirably summed up and stated, upon a review of all the authorities, 6, Corpus Juris, pp. 1157-1160, as follows:

"Sec. 156. In an action to recover the bailed property, the burden of proof is on the bailor to establish the bailment, and the failure to return the property in accordance with the contract."

"Sec. 158. The rule is undoubted that in all actions founded upon negligence, or a culpable breach of duty, the burden is on plaintiff to establish negligence by proof. This principle is recognized by all the authorities as applicable between bailor and bailee, and the only conflict is on the question whether the loss of, or damage to, the goods while in the bailee's possession raises such a presumption of negligence on his part as to establish a *prima facie* case against him."

"Sec. 159. In some of the old decisions it was held that the loss or injury raised no presumption of negligence. The bailee is not an insurer of the goods, and when they are lost or damaged, it was said that the law, which never presumes any man negligent, would rather attribute the loss to excusable causes. It was not enough for plaintiff to prove the loss or injury, but it was held that he must go further and must show that the same had occurred by defendant's negligence."

"Sec. 160. *The Modern Rule.* The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negli-

gence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part. But if the possession of the bailee has not been exclusive of that of the bailor, the rule does not apply. In order to throw the burden of evidence upon the bailee it is sufficient that the bailor has shown damage to the bailed article that ordinarily does not happen where the requisite degree of care is exercised."

The above is sustained by the almost uniform authorities cited in the notes to the above, and the reasons are thus summed up:

"1. *Reasons of the Rule.* Since the bailor is generally at a disadvantage in obtaining accurate information of the cause of the loss or damage, the law considers he makes out a case for the application of the rule of *res ipsa loquitur* by proof of the bailment, and the failure of the bailee to deliver the property on proper demand." *Corbin v. Cleaning Co.,* 181 Mo. App., 167.

"2. The rule rests upon the consideration that where the bailee has exclusive possession the facts attending loss or injury must be peculiarly within his own knowledge. Besides, the failure to return the property, or its return in an injured condition, constitutes the violation of a contract, and it devolves upon the bailee to excuse or justify the breach." *Nutt v. Davidson,* 54 Colo., 588; 44 L. R. A. (N. S.), 1170.

"3. The rule is founded in necessity, and upon the presumption that a party who, from his situation, has peculiar, if not exclusive knowledge of facts, if they exist, is best able to prove them. If the bailee, to whose possession, control, and care the goods are entrusted, will not account for the failure or refusal to deliver them on demand of the bailor, the presumption is not violent that he has been wanting in diligence, or that he may have wrongfully converted or may wrongfully detain them; or if there be injury to, or loss of them, during the bailment, it is but just that he be required to show the circumstances, acquitting himself of the want of diligence, it was his duty to bestow." *Davis v. Hurt,* 114 Ala., 150, approved *Hackney v. Perry,* 152 Ala., 633.

In 6 Corpus Juris, 1160, the conclusion from the long list of authorities and citations in the notes is thus summed up: "The burden of proof of showing negligence is on the bailor and remains on him throughout the trial. The presumption arising from the injury to the goods or failure to redeliver is sufficient to satisfy this burden and make out a *prima facie* case against the bailor; but the bailee may overcome this presumption by showing that the loss occurred through some cause consistent with due care on his part." This summing up is based, among other citations upon the very clear statement of this Court by *Walker, J.,* in *Hanes v. Shapiro,* 168 N. C., 31, in which, after stating that some of the old authorities were somewhat different, *Walker, J.,* says: "But

the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and that where the plaintiff has shown that the bailee receives the property in good condition, and failed to return it, or returned it injured, he has made out a *prima facie* case of negligence."

He further says (page 32): "Unless the bailee overcomes this *prima facie* case by satisfying the jury that the loss or damage was consistent with the absence of fault on his part, the plaintiff may prevail." And he further says (p. 33): "But those rules are, of course, subject to the qualification that the bailee is bound, in all proper instances, when intrusted with the bailee's property, to exercise due care with respect to the subject." This entitled the plaintiff to have the facts of this case submitted to the jury.

The authorities to the above effect are numerous, and the more recent authorities are uniform to that effect.

While the destruction or loss of property is not conclusive of negligence, the failure to return the property does devolve upon the defendant the burden of going forward with proof to show that it discharged its duty of requisite care of the property while in its custody. It would be singular if the mere fact that the property was destroyed or stolen or injured was conclusive that the bailee had exercised proper care. It had the best knowledge of the facts, and if proof thereof was not forthcoming the presumption is that it could not produce it.

To the same effect are the other text-books and authorities. In 3 R. C. L., 151 (Bailment, sec. 74), where explaining the apparent conflict of the later with the older cases on this point as due to the confusion between "the burden of the proof" and "duty of going forward," it is said: "The general rule, at least in the United States, seems to be that where a bailor alleges and proves simply the delivery of the property to the bailee, and the latter's failure to return it on demand, a *prima facie* case is made out against the bailee." *Ibid,* p. 152 (sec. 75), it is said that there are authorities which support the broad doctrine that "the burden of proving freedom from negligence by the preponderance of the evidence, where the property is damaged, or destroyed, is on the bailee, although it would seem that some of the cases contain language which indicate that it must be taken simply as authority for the proposition that, in case of injury to or loss of the property, the burden of overcoming a presumption of negligence rests on the bailee."

In 2 R. C. L., 1210 (Automobiles, sec. 46), it is said: "It may be accepted as settled that persons operating a garage are required to exercise reasonable care to protect and preserve automobiles placed in their custody for storage or repairs, and if an automobile so placed is injured

or destroyed on account of negligence of the garage keeper or his servants while acting within the scope of their authority the garage keeper is liable therefor. . . . On proof of the delivery of a car into a garage, if the garage keeper is unable by reason of the destruction of a car, to make return thereof, the burden is cast on him to show that the car was not destroyed by his negligence."

In Hale on Bailments, 241, it is said that, "A failure or refusal by a warehouseman to deliver, on demand, goods entrusted to him, or the return of the goods in a damaged condition, is *prima facie* evidence of negligence sufficient to cast upon him the burden of accounting for non-delivery. In other words, the burden of proving negligence rests on plaintiff throughout, but the weight of evidence shifts," citing authorities. It is further said that "The burden of the proof does not shift, but that the failure to return, or the destruction, or injury, of the property is such *prima facie* evidence of negligence that there devolves upon the bailee the duty of going forward with proof that he exercised proper care."

This is simply another way of saying that the failure to return the goods in good condition is a breach of the contract of bailment, which, if unexplained, entitles the bailor to recover, and that when the bailee claims that the property has been destroyed, or stolen, or injured without any fault on its part—it is called on to put on some proof of the circumstances thereof. These occurrences being out of the ordinary course of events, and the facts being peculiarly in the knowledge of the bailee, are sufficient evidence of negligence to carry the case to the jury.

The whole subject is exhaustively discussed in the text and notes to 6 Corpus Juris, and R. C. L., above cited, and we think the present doctrine on the subject, and the reason of the thing, is nowhere more clearly set out than in the quotation from *Hanes v. Shapiro,* above set out in Corpus Juris from the opinion of *Mr. Justice Walker,* which we think states accurately the correct conclusion.

It would be a singular proposition if the plaintiff, who has entrusted his property to the care of the defendant, should find the latter protected from liability for loss of, or injury to, the property without any proof of the discharge of his duty as bailee, though such evidence is in his special knowledge, unless the plaintiff (who is often a stranger) shall grope around among the defendant's employees to find evidence of the negligence of their employer or of their coemployees. The destruction or theft of the property, or injury thereof, not being in the ordinary course, calls upon the bailee to explain it just as a collision or derailment is *prima facie* negligence, which carries the case to the jury. *Marcom v. R. R.,* 126 N. C., 200, and citations in Anno. Ed.

In this case there was some additional evidence tending to show negligence, among others the fact that there was, on the day the machine was

left in the garage, remains of half-smoked cigarettes lying around, and that after the fire the representative of the defendant promised to pay for the loss of the machine. This evidence must be taken as true upon a nonsuit with all just inferences that can be drawn therefrom as for instance that the agent of the company had information that negligence caused the fire.

We need not, however, discuss (as the case goes back for a new trial) whether the defendant is bound by such promise for the authority of the party making such agreement is not fully brought out in the evidence. For the same reason, also, we need not consider the exceptions by the plaintiff to the evidence.

It is sufficient to say, upon the above authorities, that the failure of the bailee to return the property, with the admission that it has been burned, made out a *prima facie* case, which devolved upon the defendant the duty of going forward with proof that it had discharged its duty of proper care while entrusted with the custody of the plaintiff's automobile. Upon the evidence, this was the proper subject of inquiry, which the plaintiff was entitled to have investigated by the jury. The judgment of nonsuit is

Reversed.

ALLEN, J., dissenting: The plaintiff delivered his automobile to the defendant to be repaired in its garage, and it was destroyed by fire. There is no evidence as to the origin of the fire or of negligence on the part of the defendant. I think the rule applicable to these facts is correctly stated by *Associate Justice Walker* in *Hanes v. Shapiro,* 168 N. C., 31, as follows: "But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and that where the plaintiff has shown that the bailee received the property in good condition and failed to return it, or returned it injured, he has made out a *prima facie* case of negligence. 'When he has shown a situation which could not have been produced except by the operation of abnormal causes, the *onus* rests upon the defendant to prove that the injury was caused without his fault.' *Res ipsa loquitur.* Unless the bailee overcomes this *prima facie* case by satisfying the jury that the loss or damage was consistent with the absence or fault on his part, the plaintiff may prevail. Where the bailee makes such showing, however, as where it appears that the property was stolen or injured by *vis major,* the burden of proceeding shifts back to the plaintiff, and he must show that the bailee was negligent in exposing the property to risk of harm, or in failing to avoid the danger after it was known. In other words, the weight of the evidence may be

in favor first of one party and then the other, but the burden of establishing the issue in his favor rests on plaintiff throughout. Hale on Bailments, pp. 31 and 32."

It is not disputed that the automobile was destroyed by fire—*vis major*—and, if so, the *prima facie* case made by showing delivery and failure to return was destroyed, and he could not recover without furnishing evidence of negligence, which he has failed to do.

As it appears to me, the judgment of nonsuit ought to be sustained.

REBECCA JERNIGAN v. BLACKMAN JERNIGAN.

(Filed 25 February, 1920.)

Judgments—Excusable Neglect—Motion to Set Aside—Appeal and Error—Negligence.

Where it is found as a fact by the Superior Court judge, in denying a motion to set aside a judgment for excusable neglect, that, though the defendant was sick, his illness did not impair his faculties to the extent of preventing him from attending efficiently to his case, and he had shown himself fully capable of attending to this and other matters of litigation, and to his business interests generally, at his home, to which he was confined, and that the present action being in another county, he did not employ attorneys therein, and wrote only to nonresident attorneys at the time of placing the matter in their hands for attention, and gave it no further consideration, and judgment final, for the want of an answer, was eventually taken against him: *Held*, such facts did not show the attention of a man of ordinary prudence to his own affairs; that the fact that he had not employed attorneys practicing in the county of trial could be considered on the question of his neglect, and under this and the further facts found showing inexcusable indifference to the case, the motion was properly denied.

MOTION to set aside judgment upon the ground of excusable neglect, heard by *Connor, J.*, at his chambers in Wilson, N. C., by consent of the parties and attorneys, on 28 November, 1919.

The plaintiff alleged in her complaint that a certain deed executed by her to her husband was void, and asked that it be set aside. The defendant failed to appear or plead, and judgment by default, for want of an answer, was entered accordingly. Defendant moved to set aside this judgment for excusable neglect of the defendant, who was their father, and now deceased.

The court found the following facts: "That the summons in the action was issued by the clerk of the Superior Court of Harnett County on the 6th of May, 1916, returnable to the May term of said court, and was personally served on the defendant, Blackman Jernigan, then living

in Johnston County, by the sheriff of said county, on the 11th day of May, 1916; that a duly verified complaint was filed under authority of a special order made in this action on the 3d day of July, 1916, and no appearance having been entered, and no answer filed, a judgment by default final was rendered in favor of plaintiff and against defendant, pertaining to real estate, at September Term, 1916, of this court.

"2. That defendant, Blackman Jernigan, died on 7th day of June, 1917, and that the defendants, who file this motion, are his heirs at law and devisees named in his last will and testament.

"3. That said heirs at law and devisees, through their attorneys, now move to set aside the judgment by default final entered at September Term, 1917, and within one year from rendition of the same as determined by the Supreme Court in an appeal from the judgment rendered at February Term, 1919.

"4. That defendant, Blackman Jernigan, wrote a letter to attorneys at law, residing at Smithfield, N. C., as soon as the summons was served on him, requesting them to represent him in this action, and soon thereafter received from the attorneys a letter advising him that they would represent him; and said attorneys are and were reputable and reliable, and regularly practiced in the courts of Johnston County; but that they do not regularly practice in Harnett County, and do not regularly attend the courts of that county; that they did not enter an appearance for Blackman Jernigan, nor did they file an answer to the complaint herein; that there is no evidence from which the court can find that any other or further communication was had, by letter or otherwise, between the said Blackman Jernigan and the said attorneys, relative to this action, or to any other matter; that from the date of the service of the summons in this action on him to the date of his death, Blackman Jernigan resided in or near the town of Benson, in Johnston County, and his attorneys resided in the town of Smithfield, in said county.

"5. That Blackman Jernigan was on the date of the service of summons in this action on him, and continuously to the date of his death, confined to his home by sickness, and was physically unable to attend court or to leave his home to attend to any business whatever.

"6. That Blackman Jernigan, during the months of August and September, 1916, and during the months of January, February, and March, 1917, bought and sold land and conducted business transactions involving large sums of money. He executed and received deeds and directed the management of his business.

"7. That two actions were pending in the courts of Johnston County against the said Blackman Jernigan during the fall of 1916; that he filed answers in both said actions, and by his attorneys contested the same in said courts; that the deposition of Blackman Jernigan was taken

in March, 1917, and was used in his behalf in the trial of the case of *Lucy E. Hays v. Blackman Jernigan* in the Johnston County court.

"8. That Blackman Jernigan was continuously, between the date of the service of the summons in this action upon him, and the date of his death, mentally capable of attending to business, and of communicating by letter and otherwise with persons relative to business matters.

"9. That the plaintiff, Rebecca Jernigan, was the wife of Blackman Jernigan; that no children were born of their marriage; that the land which is the subject-matter of this action was owned by Rebecca Jernigan prior to her marriage, and was, after the marriage, and while she was living with her husband, conveyed by her and her husband to M. C. Butler, who, contemporaneously with the conveyance of the land to him, conveyed the same to Blackman Jernigan; that thereafter Blackman Jernigan ceased to live with the said Rebecca Jernigan, and the purpose of this action was to have the two deeds declared void for the reason set out in the complaint; that the affidavits filed herein by the heirs at law and the devisees of the defendant, Blackman Jernigan, and the answer tendered to the court, disclose a meritorious defense to the plaintiff's cause of action.

"Upon the foregoing facts, the court was of the opinion, and so held, that the failure of Blackman Jernigan to file an answer to the complaint was not due to any mistake, inadvertence, surprise, or excusable neglect on his part, and that the motion to set aside the judgment rendered by default at September Term, 1916, ought to be, as a matter of law, denied.

"It is therefore ordered and adjudged that the said motion be, and the same is, denied, and that the plaintiff recover of the defendants, heirs at law and devisees of Blackman Jernigan, the costs incurred upon this motion."

Defendants excepted, and appealed.

Godwin & Williams, E. F. Young, and Robert W. Winston for plaintiff.

C. L. Guy and Clifford & Townsend for defendants.

WALKER, J., after stating the facts: We are of the opinion that the order of Judge Connor refusing to disturb the judgment was plainly correct. It is now almost an axiom to say that persons of sound mind, who are served with process to appear in an action and answer a complaint, should be active and diligent in the protection and preservation of their rights, and the least that can be expected of them is that they will give the case that attention which a man of ordinary prudence usually bestows upon his important business. If he fails in this respect he can have no relief under the statute in the way of vacating the judg-

ment, which has been entered because of his default in appearing and pleading. *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 394; *School v. Peirce,* 163 N. C., 427; *McLeod v. Gooch,* 162 N. C., 122; *White v. Rees,* 150 N. C., 678; *Pierce v. Eller,* 167 N. C., 672. The law does not favor those who sleep upon their rights, but those who are vigilant, and give them proper attention. This is a very ancient maxim, and it has frequently been applied by us to cases of this kind. *School v. Peirce, supra.*

Applying this principle to our case, we find the facts to be, as stated by the learned judge, that the original defendant against whom the judgment was rendered, was at the time of perfectly sound mind; he retained attorneys, who lived in his own county, not far from his home; he had other cases to which he gave the requisite attention, and he was capable of guarding his interest in this case, and of consulting with his attorneys in regard to it, and filing his answer. The mere fact that he was sick is not, of itself, sufficient to excuse him, for the judge finds that, notwithstanding his illness, he was able to have his answer prepared and filed. It was said in *Pierce v. Ella, supra,* that "the defendants (in that case), it is true, were old and feeble, but there is no finding that they are not of sound mind," and their neglect to answer was not excused. Here it is affirmatively found that the defendant was of sound mind, though enfeebled by disease, and not able to leave his home, and that he had actually attended to his ordinary affairs efficiently and in the usual way, except as above indicated. The court found, as will appear, by reference to the statement of facts, that he had directed the management of his business, and even the other litigation then pending, and especially that he had filed answers in two civil actions during the period of his sickness and confinement at his home. It appears that, notwithstanding the ability of Blackman Jernigan to file his answer, he never wrote but one letter to his attorneys about the business, and that was when he retained them to appear for him, and he took no further steps himself to see that an answer was filed. We have held, as before indicated, that a party has no right to abandon all active prosecution of his case simply because he has secured counsel to represent him in it. *McLeod v. Gooch, supra.* It further appears that he employed attorneys not residing in Harnett County, where the case was pending, and not practicing in its courts. The learned judge could consider this fact upon the question of negligence. *Manning v. R. R.,* 122 N. C., 824; *Osborn v. Leach,* 133 N. C., 428; *Williamson v. Cocke,* 124 N. C., 585; *Hardware Co. v. Buhmann,* 159 N. C., 511; *McLeod v. Gooch, supra.* As said by this Court in *Kerchner v. Baker,* 82 N. C., 169, and affirmed in *White v. Rees,* 150 N. C., 678: "The course of the defendant was not the care of an ordinary prudent man in reference to his own personal interest, nor was

it consistent with the proper deference and attention due from the defendant and every suitor to the known and orderly course and practice of the courts in the administration of the law. 'The defendants have lost their rights, if they had any to protect, by their own inattention and inexcusable neglect.'" We added in *White v. Rees, supra:* "The defendants have lost their rights, if they had any to protect, by their own inattention and inexcusable neglect." There is no finding that Blackman Jernigan was prevented by illness, or other reasonable cause, from communicating with his counsel, and thereby making known to them his defense, but the contrary is stated as the fact, and the cases where that appeared, such as *Mebane v. Mebane,* 80 N. C., 34, do not apply.

The facts present a case of inexcusable neglect within the meaning of the statute, and the decision of the court was correct.

Affirmed.

IN RE PETITION OF C. F. ELKS v. COMMISSIONERS OF PITT COUNTY.

(Filed 3 March, 1920.)

1. Evidence—Irrelevant—Without Prejudice—Appeal and Error—Trials.

The admission of evidence which is neither relevant nor prejudicial to appellant, and which is not responsive to the question, or excepted to, will not be held for reversible error on appeal.

2. Counties—Road Commissioners—Roads—Highways—Condemnation—Damages—Location of Road—Discretion.

Where a part of the owner's lands has been taken by the county in straightening a highway, and he is left with the use of the old road running near his dwelling on another part of his land, he is not entitled to having considered by the jury, in estimating his damages, the fact that the new road did not run by his dwelling, the location of the new part of the road being a matter entirely within the discretion of the proper county authorities.

3. Same—Diminution of Damages—Evidence—General Benefits—Statutes Constitutional Law.

The usual rule that in arriving at the damages to lands of the owner in taking them for a *quasi*-public use, as relating to railroads and the like, only special benefits may be considered in diminution does not always apply, especially to counties and cities as to streets, public roads, and highways, for it is within the discretion of the Legislature to allow in all or in any case, as a deduction not only those benefits special to the lands so taken, but also those general to the lands in that vicinity, and a statute allowing the consideration of such general benefits is constitutional and valid. Sec. 8, ch. 714, Laws 1905.

4. Appeal and Error—Objections and Exceptions—Evidence—Counties—Roads and Highways—Damages.

Where the commissioners of a county are sued by the owner of lands for damages for taking a part thereof for a public road or highway, and the defendants do not appeal from an instruction of the court that the jury could only consider in diminution the special benefits to the land, when under a statute applicable they could also have considered the general benefits to lands in that vicinity, they cannot on appeal take advantage of the error so committed.

APPEAL by plaintiff from *Kerr, J.*, at September Term, 1919, of PITT.

This was a proceeding by plaintiff under sec. 8, ch. 714, Laws 1905, asking that a jury be appointed to assess damages caused to his land by the county taking 7/10 of an acre of land in the construction of a public road. The jury was duly appointed, and made its report allowing defendant $175 damages. Without waiting for the commissioners to take action, the plaintiff appealed to the Superior Court. At the trial in that court the jury awarded the plaintiff $225 damages, and he appealed to this Court.

Julius Brown for plaintiff.
Skinner & Whedbee for defendant.

CLARK, C. J. The witness Tyson had testified as to the damages to the plaintiff's land, and on cross-examination he was asked if he had claimed any damages for the road going through the witness's land, to which he answered: "I would have done so if I had thought it would have been of any use." The witness owned adjoining land, and the question was competent as tending to shake his testimony as to the damage the plaintiff had sustained. We cannot see that the plaintiff sustained any harm from the answer, which at most was merely irrelevant.

Another witness was asked on cross-examination: "What value is the little piece of land?" to which he replied, "I do not consider that little piece of much value to my father unless he could get more." While the answer may not have been very responsive, there was no motion to strike it out, and it does not appear that any harm accrued that would justify a new trial.

Exception 3. The court charged the jury: "If you find the plaintiff is damaged, you will not take into consideration the fact that his home is off the road, because the action was not brought by reason of his house being cut off of the road, but by reason of the highway commissioners taking this portion of the land through which the road passes." The plaintiff's evidence discloses that his house was not upon lot No. 4, or lot No. 1, but was on an entirely different tract of land situated on the north side of the old county road, as shown on the map. The plaintiff

still has the old county road to use as he did previously to laying out this road, except that he himself has built a tobacco barn across it, as shown on the map, and in that respect he can recover no damage by reason of laying out the new road. If he could, then any other person living four or five miles or further from the new road could contend that they were entitled to damages because the new road was not constructed by their home. The county commissioners simply did not see fit to build a new road along the line of the old road by the plaintiff's residence, but the plaintiff still has that old road so far as he sees fit to use it.

The fourth exception is that the court directed the jury to allow the plaintiff: "What would be a fair compensation for his land, taking into consideration the value of his land immediately before, and the value of his land immediately after, and the difference in value would be the damages he has sustained by reason of the road running through his land." Sec. 8, ch. 714, Laws 1905, under which this proceeding was begun, provides: "Said jury, being duly sworn, in considering the question of damages, shall also take into consideration the benefits to the owner of said land, and if such benefits shall be considered equal to or greater than the damages sustained, then the jury shall so declare and report in writing its findings to the board of county commissioners for revision or confirmation."

In *Lanier v. Greenville,* 174 N. C., 317, the Court said: "We have adhered to the rule that in the assessment of damages for land taken for public improvement the measure of damages is the difference in value before and after taking. We are less inclined to change the rule since it was held in *Miller v. Asheville,* 112 N. C., 768, that it was within the power of the General Assembly to provide by statute that damages should be reduced not merely by benefits special to the plaintiff, but by all the benefits accruing to him, either special or in common with others." In *Miller v. Asheville* the Court held constitutional an act providing that all benefits should be considered in reducing damages, notwithstanding the fact that the property had been taken by the city prior to the enactment of the statute, and notwithstanding that proceedings for the assessment of damages had been instituted before this statute was passed.

The counsel for the commissioners contend that under the language of this statute the county was entitled to have set off against the damages assessed not only the special benefits to the owner of the land, but the benefits which actually enhanced the market value of the property, although they are common to other property in the vicinity. We cannot consider this contention, for the defendants are not appealing, and the plaintiff cannot complain that the benefits set off were restricted to the special benefits as laid down in *Lanier v. Greenville, supra.*

Exception 5 is that the court charged the jury: "The defendants contend that they offered evidence that the plaintiff has not been damaged as much as $600; and that you should find that the special benefits have accrued to him in that this special piece of property is more valuable now than before the road was built; the defendant contends that it is a nice wide public road, and puts his land in contact with the public; for the people who want to get to the county-seat and that this ought to be taken into consideration, and the court charges you that if you find that a special benefit has accrued to this land by reason of this road being put there, then you might consider that in determining what damages he has sustained, if you find any special benefits have accrued to this land."

Exception 6 is to a charge of like nature. As already stated, these charges are in accordance with the general rule which has obtained in this State in the absence of legislation restricting or enlarging the nature of the benefits to be deducted, and the plaintiff cannot complain.

Exception 7 is to a like charge by the court: "As I said a moment ago, if you find any special benefit has accrued to the plaintiff by reason of the building of the road through his property, you can consider it in determining the amount of damages you may arrive at, but if no special benefit has accrued to him, and if the benefit he gets is common to adjacent landowners, then you will not consider that." This charge was correct under the general rule.

The last exception, except those purely formal, is to the following charge: "The jury will not take into consideration the fact that the plaintiff's house was left off the road, and is not now on the road; this proceeding is to procure damages for and on account of the taking of the land, part of those two lots which were necessary to build this road, and the fact that this house and home is left off the public road you will not take into consideration at all, but only take into consideration the damage by reason of the taking of the land from these two lots of land, and say what you find the damage to be."

This has already been discussed under the third exception. The county was under no contract with the plaintiff not to lay out a new public road, in order to make a new and shorter route needed for the public convenience. In doing this, the county did not cut off the plaintiff from the public road, upon which the plaintiff's house stood. The principle of public administration is the "greatest good for the greatest number," and a new, better, and shorter road being needed for the public convenience, the plaintiff could not complain that it was not built over the old route. The road on which this house stands remains where it was, and if the plaintiff does not use it, and has built a tobacco barn across it, as it appears, is because he finds it more convenient to get to the new road by a different route.

In view of the great increase in the mileage of public roads in construction, or in contemplation, and that neither the State nor the Federal Government will permit any part of their appropriations for roads to be used in payment for any part of damages for rights of way, it follows that all such damages fall upon the county alone, and it is a matter of great moment what method should be adopted in allowing deductions from such damages for benefits accruing to the landowner.

It seems that the general rule prevailing throughout this country is that laid down in *Traction Co. v. Vance,* 9 L. R. A. (N. S.), 781; *S. c.,* 225 Ill., 270. "In assessing damages for injury to land, not taken in a proceeding to secure a railroad right of way, benefits may be set off which actually enhance the market value of the property, although they are common to other property in the vicinity." In proceedings to condemn land for the use of a railway, which is not entirely for public benefit, but in part at least for private emolument, the rule seems to be generally settled either that no benefit shall be deducted, or, at least, only those that are of special benefit to the owner, not including the enhancement in the value of his land, which accrued to him in common with others in that vicinity. But when the condemnation is for a public benefit, as the widening of a street, as in *Miller v. Asheville, supra,* or for the construction of a public road, or other purposes of a purely public nature, solely for the general benefit, the usual rule seems, as in the case above quoted from 9 L. R. A. (N. S.), 781, to reduce the damages by all the benefits accruing to the landowner, whether special or general.

The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a *quasi*-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general.

In 2 Lewis Em. Dom., secs. 687-689, the different methods are stated to be five in number, but, in fact, they can be reduced to three, *i. e.:*

1. Condemnations in which there are no deductions allowed at all for benefits.

2. Where deductions are only allowed for special benefits accruing to the owner.

3. Where deductions are allowed for benefits, both special and general.

This matter is discussed fully by *Connor, J.,* in *R. R. v. Platt Land,* 133 N. C., 272-274, where he shows that all three methods have obtained in this State, either by amending the general statute or the charters in special cases, citing *Miller v. Asheville,* 112 N. C., 759, where by the

terms of the statute (Pr. Laws 1891, ch. 135, sec. 16) it was made the duty of the jury in assessing damages for opening or widening streets to consider "All benefits special to said land, and also all benefits, whether real or supposed, which the parties may derive from the construction of said improvements, whether it be common to other lands, or only special to their own." This latter rule is held in the Illinois case above cited to obtain generally in this country when the assessment for damages is for purely public purposes.

The changes of the statute in this regard in North Carolina stated by *Jude Connor* in *R. R. v. Platt Land, supra*, is more fully set out in the note to *Traction Co. v. Vance*, 9 L. R. A. (N. S.), at page 806. It appears therefrom that "the early rule in this State was that special benefits might be set off against the value of the land taken for public use, and against damages for the remainder; that this rule was abrogated by statute and afterwards restored by statute."

In *Freedle v. R. R.*, 49 N. C., 89, it was held that only such benefits could be deducted as were peculiar to the owner of the land taken and not general benefits, such as increased facilities for getting to market, the increased prosperity of the country, and the consequent growth in the value of real estate—such benefits as were common to all. The same rule was held in *Asheville v. Johnson*, 71 N. C., 398; *R. R. v. Wicker*, 74 N. C., 220; *Haislip v. R. R.*, 102 N. C., 376, but in *Miller v. Asheville*, 112 N. C., 759, where a statute was passed after the proceeding was begun providing that general benefits as well as special benefits were to be deducted from the assessment of damages in opening or widening streets, the Court held that this was a mere change of remedy and the act was sustained. All the above decisions were reviewed, and the changes of the statute set out in *R. R. v. Platt Land*, 133 N. C., 266, in which the Court sustained *Miller v. Asheville*, which held (p. 768) that it was a matter resting in the discretion of the Legislature, which "could reduce the damages by all the benefits accruing to the plaintiffs, or only by those special to the plaintiff, since it conferred the right of eminent domain. . . . Compensation was made when the balance was struck between the damages and the benefits conferred. To that, and to that alone, the owner had a constitutional and vested right. The Legislature, in conferring upon a corporation the exercise of the right of eminent domain, could, in its discretion, require all benefits, or a specified part of them, or forbid any of them to be assessed as offsets against the damages. This was a matter which rested in its grace, in which neither party had a vested right, and as to which the Legislature could change its mind always before rights were settled and vested by a verdict and judgment."

This decision is followed by *Hoke, J.*, in *Bost v. Cabarrus*, 152 N. C., 536, and *Allen, J.*, in *Lanier v. Greenville*, 174 N. C., 317, affirming

Miller v. Asheville, supra, as to the power of the Legislature to authorize the deduction of general as well as special benefits from the damages assessed, but holding that if the statute does not so provide, only the special benefits will be deducted.

Owing to the importance of the subject, and its full discussion in this case, we have traced the history of the rule. In the damages assessed, we find

No error.

W. C. HUDSON v. U. H. COZART, W. P. ANDERSON, S. W. SMITH, J. C. EAGLES, W. G. CARR, ET AL.

(Filed 3 March, 1920.)

1. Tenants in Common—Options—Contracts—Tender.

Ordinarily tenants in common are not, merely from that relationship, authorized to make agreements or receive notices substantially affecting the estate or interest of each other in the common property, but when all of them have entered into a joint and binding agreement conferring a purchase option on a third person, such an instrument will constitute one the agent of the other for the purpose of a tender, which will turn the agreement into a bilateral contract, especially when their executed agreement, from its language and purport, contemplates an indivisible contract to be performed in its entirety.

2. Same—Partial Consideration.

An option given by tenants in common on their lands to be exercised by the grantee upon the payment of a specified sum of money, and erect thereon a redrying plant for the coming tobacco season for that year, necessitates his holding the title to the entire property, in order to its full performance, and his unaccepted tender of the purchase price alone, is not of the full consideration he has agreed to pay, and will not entitle him to specific performance of the contract as a bilateral agreement.

3. Contracts— Options— Tender— Full Consideration— Equity— Specific Performance.

A grantee of an option of lands is required to aver and prove performance on his part as required by his contract, and where he has duly tendered the money consideration within the specified time, and as a part of the consideration for the contract, he is also required to erect a redrying plant upon the lands, in order to maintain his suit for specific performance, he must not only show his readiness, willingness, and ability at any time to make good his tender of the money refused, but also to erect a redrying plant according to his agreement.

4. Contracts—Options—Performance in Part—Specific Performance—Equity.

A contract for the purchase of land indivisible in its nature, and to be performed in its entirety, may not be specifically enforced partially, or as to its separate provisions.

5. Same—Actions—Several Sellers—Dismissed as to Some—Appeal and Error—Objections and Exceptions.

Where a contract to purchase is for the whole of the lands of several tenants in common, specific performance will not be decreed against them when the action has been dismissed as to some of them without exception or appeal by the plaintiffs.

6. Contracts—Options—Tender in Part—Waiver—Consideration.

Where an option, which has become a bilateral agreement to purchase land, is given upon consideration of a certain sum of money, and the erection by the purchaser of a redrying plant by a certain time, the time granted is for the benefit of the purchaser, which the seller may waive without affecting his rights to receive the full consideration.

CIVIL ACTION, tried before *Devin, J.*, and a jury, at October Term, 1919, of WILSON.

The action is to enforce the specific performance of a contract to convey a parcel or lot of land in the city of Wilson, pursuant to an option to purchase the same, contained in a written agreement executed by defendants to the plaintiff.

On the hearing, it was admitted that the said lot was owned by the five named defendants, the interest being as follows: one-third by S. W. Smith, one third by W. P. Anderson, one-sixth by U. H. Cozart, and one-twelfth each by Eagles and Carr. It further appeared that the defendants had executed the written agreement, and that no deed for the lot had been made. The defendant, S. W. Smith, made no answer to the complaint of plaintiff, duly verified, and the bill was taken *pro confesso* as to him. The four other defendants having joined issue, there being no evidence of a personal tender of the purchase price within the time required by the option on defendants, Eagles and Carr, the action, on motion, was dismissed as to these defendants, and, issues having been submitted as to the liability of U. H. Cozart and W. P. Anderson, the jury rendered verdict as follows:

"1. Did the defendants execute and deliver the contract, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff at all times ready, able, and willing to comply with the provisions of the contract? Answer: 'Yes.'

"3. Did the plaintiff tender performance of the contract, prior to 15 March, 1916, to the defendants, Cozart and Anderson? Answer: 'Yes.'"

Judgment for specific performance as to these defendants, and, it appearing that said defendants are married men, and that their wives had not signed the written agreement conferring the option, the decree provided for a proportionate abatement of the purchase price unless the wives of said defendants should voluntarily join in the execution of the

deeds for the property. Defendants, Anderson and Cozart, having duly excepted, appealed.

F. S. Spruill and W. A. Finch for plaintiff.
H. G. Connor, Jr., and Wm. A. Lucas for defendants.

HOKE, J. On the trial it appeared that the five defendants named, owning a lot in the city of Wilson, on 31 January, 1916, entered into a written agreement, under seal, conferring on the plaintiff an option to buy the designated parcel of land, the portions of the agreement more directly relevant to the inquiry being as follows:

"And the said parties of the first part, plaintiffs, hereby contract and agree to execute and deliver to the said party of the second part, his heirs and assigns, at or upon his request, on the 15th day of March, 1916, a good and sufficient deed for the said tracts of parcels of land described above, with full covenants and warranty: *Provided,* and upon condition, nevertheless, that the said party of the second part shall well and truly pay to the parties of the first part, their heirs and assigns, in cash, the sum of five thousand dollars on the said day of March, 1916, in good and lawful money, and being in full payment as the entire purchase money for aforesaid described lots or parcels of land, together with all appurtenances now situate on same.

"It is understood and agreed by the parties to these presents, that said sale is to be made at the option of the said party of the second part, and to be exercised on or before the 15th day of March, 1916, and it is further agreed that in case the said party of the second part does not demand of the parties of the first part, the deeds herein provided for as herein agreed and tender payment as set forth above, that on the 15th day of March, 1916, this agreement shall be null and void, and the parties of the first part, their heirs and assigns, shall be at liberty to dispose of the said lots or parcels of land in such a manner as if this contract had never been made, and neither the parties of the first part nor the party of the second part shall have any claim whatsoever on the other in either law or equity.

"It is also further agreed by the party of the second part, that he will erect upon the property described above a redrying plant, said plant to be erected by the opening of the tobacco market in the fall of 1916, and at the time of delivering said deed or deeds, should this option of purchase be exercised by the party of the second part, upon request of the parties of the first part, the party of the said part shall make such assurances in good faith that may be accepted by the parties of the first part as to the erection of the aforesaid redrying plant, that the deed or deeds may be properly delivered to the party of the second part, and the failure

on the part of the party of the second part to make unto the parties of the first part the assurances, as be reasonably required by them as to the use of the aforesaid lots or parcels of land, will render this agreement null and void, neither party having any recourse at law or equity."

The plaintiff, a witness in his own behalf, testified further on the issues: "That, on March 14th, one day before the last day of the option, I got a notary public, saw Mr. U. H. Cozart, one of the defendants, on the street, and told him I was ready to sign the deed; told him I had the money ready in the First National Bank. He said, wait and I will see Anderson, and refused to sign the deed. I met them, Anderson and Cozart, and they were talking. They were standing in front of the First National Bank, in which I had the money. Anderson said he was not going to sign the deed. Mr. Cozart went into the bank and saw Col. Bruton, I suppose, and refused to sign. I was ready, able, and willing to pay the money, and still am."

On this, the only oral evidence offered, the action having been dismissed as to Eagles and Carr, the jury rendered a verdict, as stated, against the defendants, Cozart and Anderson, and the court gave judgment that these defendants convey their interests on payment of their proportion of the purchase price, subject to abatement for their wives' interest in the property, and a similar judgment was entered against the defendant Smith, who had failed to answer, or in any way resist the recovery sought.

From a perusal of the agreement, it appears that this was an option conferred upon the plaintiff requiring an offer to perform within the time, and in this instance to include a tender of the purchase money at or before the execution of the deed. *Timber Co. v. Wells*, 171 N. C., 262; *Ward v. Albertson*, 165 N. C., 218; *Winders v. Kenan*, 161 N. C., 628; *Hardy v. Ward*, 150 N. C., 385; *Trogden v. Williams*, 144 N. C., 192. And plaintiff was also, if requested thereto, to give satisfactory assurance as to a redrying plant, which he was to build upon the property as a part of the consideration. Ordinarily, tenants in common, merely from that relationship, are not authorized to make agreements or receive notices substantially affecting the estate or interest of each other in the common property, but where, as in this instance, such tenants have entered into a joint and binding agreement conferring a purchase option on a third person, such an instrument will constitute one the agent for the other for the purposes of a tender, which will turn the agreement into a bilateral contract, and, in our opinion, this is assuredly true in regard to an agreement of the kind presented here, which, from its language and purport, clearly contemplates an indivisible contract to be performed in its entirety. Not only does this appear from the joint covenant to make title on the part of defendants, but also from

the consideration promised by the plaintiff, to wit, that he will pay $5,000 for the property, and erect thereon a redrying plant in time for the tobacco season of 1916, a stipulation which necessitated his holding a title to the entire property in order to its valid performance. *Wright v. Kaynor,* 150 Mich., 7; *In re Jeremiah P. Robinson,* 40 N. Y. Sup. Ct., 23; *Flanagan v. Seeyle,* 53 Minn., 23; *Baker & Brun, Admrs., v. Kellog et al.,* 29 Ohio St., 663; *Detlor et al. v. Holland,* 57 Ohio St., 492; *Carman v. Puet,* 21 N. Y., 547; *Dykman v. Mayor,* 5 N. Y., 434; *Blood v. Goodrich,* 9 Wendell, 68; *Dawson & Springer v. Ewing,* 31 Pa. St., 371; 38 Cyc., 106; 17 A. and E. Enc. (2d ed.), 672. In the *Michigan case, supra,* there was a lease by husband and wife, tenants in common, with an option to renew on notice. The wife having died, leaving heirs at law, notice as to renewal was served only on the husband, and the principal question was whether the heirs of the wife were bound. In the original opinion it was held that they were not bound, applying the general principles that one tenant in common could not ordinarily bind the others, but, on reargument, the decision was modified or changed in this respect, and it was held that notice to the husband was sufficient by reason of the joint agreement on the part of lessors. In delivering the prevailing opinion, *Carpenter, Judge,* said: "The lessors were joint contractors in this lease. Jointly they agreed to renew it, and to insert in said renewal an option whereby the lessee might purchase not their several but their joint interests. Between the lessors there was, therefore, the relationship of joint contractors as well as the relationship of tenants in common. Allen (the lessee), under these circumstances, could pay the rent to either, and either of them could discharge the obligation. Among joint obligees any one may receive satisfaction for the entire obligation and execute a valid discharge therefor. The remedy of other joint obligees is against him and not against the one who has made payment to him. 7 Amer. and Eng. Enc. Law (2 ed.), 102.

"In support of this text numerous authorities are cited, which fully sustain it. Though only one of these two joint contractors refused to convey, both would be liable for damages, for they have jointly agreed to convey the entire title. *Blood v. Goodrich,* 9 Wendell (N. Y.), 68. The principle underlying these decisions is, in my judgment, applicable to this case, and compels us to say that the notice given to defendant Ansel of Allen's election to renew the lease was binding upon Augusta and her estate, not because she was a cotenant, but because she was a cocontractor."

The plaintiff, then, having established a tender of the purchase price within the time as to two of these co-owners, has matured his claim under the option as to all, and the question recurs on his right to specific performance of the contract as a bilateral agreement. It is the recog-

nized principle that in order to relief, in actions of this character, it is required that plaintiff shall aver and prove performance or offer to perform, or a readiness and ability to carry out the contract on his own part.

In Pomeroy's Eq. Jurisprudence (3d ed.), sec. 1407, the position is stated as follows: "The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done, or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms."

A similar statement on the subject appears in Pomeroy on Contracts (Specific Performance), (2d ed.), sec. 323, and, speaking further to the subject, this author, in sec. 330, says: "The party seeking aid of the court, as actor, must not only show that he has complied with the terms so far as they can and ought to be complied with at the commencement of the suit, he must also show that he is able, ready, and willing to do those other acts which the contract stipulates for as a part of its specific performance."

Numerous cases here and elsewhere show this to be a correct statement of the doctrine. *Bird v. Bradburn*, 127 N. C., 411; *Mincey v. Foster*, 125 N. C., 541; *Bank of Columbia v. Hagner*, 26 U. S., 455. And, in our opinion, its proper application to the facts presented is against plaintiff's right to relief by specific performance. This, as we have seen, is a contract by which defendants agree to sell and convey to plaintiff the lot in question, and plaintiff on his part is to pay $5,000 at or before the execution of the deed, and to build upon the lot a redrying plant. This, while it is to be done after the execution of the deed, is a part of the consideration that plaintiff is to pay for the lot, and, under the principle referred to, he is required to aver and show that he is ready and willing to carry out this part of the contract also. Not only is there no averment or proof to this effect, but a perusal of the complaint will disclose that plaintiff does not intend to comply with this feature of the agreement, and does not consider that he is any longer under obligation in this respect. Both in his allegations and proof, therefore, he has failed to show that he is ready and willing to perform the stipulations of the agreement.

Again, so far as the title is concerned, this is a contract indivisible in its nature and to be performed in its entirety, and specific performance may not be enforced partially nor as to its separate provisions. This position was adverted to with approval by *Associate Justice Connor*, in

Tillery v. Land Co., 136 N. C., 537-543, and is in accord with the authoritative decisions on the subject. *Tillery v. Land Co.; Telfener v. Russ,* 162 U. S., 170; *Welty v. Jacobs,* 171 Ill., 624; *Baldwin, Admr., v. Fletcher,* 48 Mich., 604; *Combs v. Little,* 4 N. J. Eq., 310. In the *Michigan case, supra,* the principle is stated as follows: "A bill will not lie for the specific performance of particular stipulations to be separated and dealt with apart from the rest of the contract if they do not appear to stand by themselves, wholly unaffected by the others. A party to a contract who insists upon parts of it must abide by it in its entirety."

Under the terms of this instrument, as a bilateral agreement, plaintiff is not to acquire title to this property on the payment of $5,000, but he is to pay this amount, and also build on the lot a redrying plant. This last is as much a part of the consideration as the other, and, in order to its proper performance, it is necessary for plaintiff to have the entire ownership of the lot or to establish a binding agreement by which such ownership may be acquired. On perusal of the record, it appears that the court below, on motion, has dismissed the action as to two of the defendants, Eagles and Carr. This may have been an erroneous ruling on the part of his Honor, but it stands until it is in some way modified or reversed, and plaintiff has neither appealed nor excepted. He is, therefore, no longer in a position to carry out his part of the contract nor pay the consideration promised by him.

We are not inadvertent to the fact that the redrying plant was to have been built in time for the tobacco market of 1916. This requirement as to time, however, was inserted for the benefit of defendants, which could be waived by them, and has been waived by their failure to execute the conveyance, but the construction of the redrying plant has not been waived as a part of the consideration to be paid for the property, and plaintiff, who seeks to enforce specific performance of the contract, must, as stated, allege and prove that he is ready and willing to comply with its terms. This he has failed to do, and, in our opinion, the action must be dismissed also as to appellants, Cozart and Anderson, The defendant Smith having failed to answer or except, is bound by the judgment, and must comply with its terms.

Reversed.

MRS. GEORGE G. BRICKELL v. WADE H. HINES.

(Filed 3 March, 1920.)

1. Habeas Corpus—Parent and Child—Custody of Child—Natural Parents —Right of Parents.

The parents have *prima facie* the right to the custody and control of their infant children as a natural and substantive right not lightly to be denied or interfered with by action of the courts; but this right is not universal and absolute, and may be modified and disregarded by the court when it is made to appear that the welfare of the child clearly requires it.

2. Same—Adopted Child.

Where, under legislative provision and before a court of competent jurisdiction of the cause and the parties, an infant child has been duly adopted, the care, custody, and control of the child is thereby transferred to the adopting parents, and the force and effect of the proceedings and decree will follow the parties on a change of domicile and control the personal relationship existent between them; but the status of the adopting parents can be no better than that of the natural ones, and must give way to the latter where it appears, in *hapeas corpus* proceedings, that the future welfare of the child will thereby be materially promoted.

HABEAS CORPUS proceedings to determine as to care and custody of an infant child, now three and a half years of age, heard, on petition of the parents, before *Daniels, J.*, at chambers in Goldsboro, N. C., on 20 September, 1918.

It appeared that the child, in 1916, when one month of age, had been adopted by respondents, on proceedings had in the Hustings Court of the city of Richmond, in 1916, the *feme* plaintiff, not then married, joining in the petition for adoption, and had since been cared for by respondents, now domiciled in North Carolina, petitioners being also resident and domiciled here. There was evidence tending to show that, under circumstances now existent, the welfare of the child would be best subserved by awarding the same to the petitioners, its parents. The court having so found, there was judgment awarding the child to the care and custody of petitioners, and respondents excepted and appealed.

J. Faison Thomson for plaintiff.
Hood & Hood for defendant.

HOKE, J. It has been held in several recent decisions, where the question was directly considered, that parents have *prima facie* the right to the custody and control of their infant children, and that the same being a natural and substantive right, may not be lightly denied or interfered with by action of the courts. It is further held in these and other cases that this right of the parents is not universal and absolute, but

that the same may be modified and disregarded when it is made to appear that the welfare of the child clearly requires it. *In re Warren,* 178 N. C., 43; S. E., 76; *In re Means,* 176 N. C., 307; *Atkinson v. Downing,* 175 N. C., 244. The last case citing, among others, *In re Fain,* 172 N. C., 790; *In re Mary Jane Jones,* 153 N. C., 312; *Newsome v. Bunch,* 144 N. C., 15; *In re Alderman,* 157 N. C., 507; *In re Turner,* 151 N. C., 474; *In re Samuel Parker,* 144 N. C., 170. It is also the accepted position, as pertinent to the facts of this record, that, when an infant child has been duly adopted, pursuant to legislative provision and before a court having jurisdiction of the cause and the parties, this right of the natural parent, under the regulations usually prevailing in such cases, as to care, custody, and control of the child is thereby transferred to the adopting parents, and the force and effect of the proceedings and decree will follow the parties on a change of domicile and control the personal relationship existent between them. 1 R. C. L., 611; 1 Amer. and Eng. Ency. (2d ed.), 733. This right of the adopting parents, however, is usually no greater than the natural, and, as said in *Downing's case:* "Here, too, the welfare of the child is entitled to full consideration, and, on especial facts, may become controlling in the disposition of its custody."

Applying these principles, the wise and learned judge, having investigated the case and set forth fully the testimony pertinent to the inquiry, has found and adjudged "that it is to the interest of the infant child that she be placed in the custody of her natural parents, and that her future welfare will be thereby materially promoted."

In our opinion, the facts in evidence are in support of his Honor's conclusion, and the judgment awarding the child to its natural parents is

Affirmed.

LUMBERMAN'S MUTUAL INSURANCE COMPANY v. SOUTHERN RAILWAY COMPANY AND NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 3 March, 1920.)

1. Pleadings—Demurrer—Actions—Consideration.

Where the judge sustains a demurrer to the complaint and dismisses the action for the lack of necessary parties who have pending in the same court separate actions against the same defendant involving substantially the same subject-matter, and thereupon properly grants the plaintiff's motion to consolidate all of these actions into one action, the granting of the motion to consolidate overrules the demurrer, and renders immaterial the question as to whether the demurrer was properly overruled, and under the circumstances of this case it is *Held,* that it was not necessary to dismiss the first action upon overruling the demurrer.

2. Actions—Consideration—Parties—Multiplicity of Suits—Statutes—Insurance, Fire—Equity.

Several insurance companies issued policies of fire insurance in various amounts on the owner's property, which was destroyed by fire set out by a railroad company, and each of the companies paid off its respective loss and all of them then brought several actions against the railroad company alleging negligence. The first action coming on for trial, the judge granted plaintiff's motion to consolidate all the actions, to bring in the owner of the destroyed building as a necessary party, and to allow amendments to the several complaints to meet the change from separate actions to the form of the consolidated one: *Held,* the general principles as to the law of negligence being the same in each of the actions, the motion for consolidation was properly allowed, with permission to amend the pleadings, under the provisions of our statutes to have all matters of controversy settled in one action, when it can be done without prejudice to the rights of any of the parties, or to a fair and full trial and consideration of the case. Rev., 409 to 414, inclusive, and 469.

3. Pleadings—Amendments—Cause of Action.

Amendments by the court to the complaint, and the bringing in of new parties, which merely broadens the scope of the action so as to take in the whole controversy for its settlement in one action, and made without substantial change in the action as originally constituted, do not change the original cause, but are within the contemplation of our statute, and may be allowed by the court. Rev., 414.

4. Insurance, Fire—Damages—Subrogation—Statutes—Equity.

Where the insurer against loss by fire has paid the loss to the owner of the building destroyed by the actionable negligence of another, the insurer is subrogated to the rights of the owner, both in equity and under the statutory form of the policy, Rev., 4760, and may maintain his action against the tort feasor and recover the amount he has so paid, covered by the policy contract; and the owner is a proper party thereto as the holder of the legal title, through whom the right of the insurer is to be enforced.

CIVIL ACTION, heard on appeal from *Connor, J.*, at the November Term, 1919, of WAYNE.

This case is one of five separate actions brought by insurance companies to recover the total sum of $14,339.36, which was paid by them to the Griffin Manufacturing Company for loss of property destroyed on 1 April, 1917, by the negligence of the defendants, with interest from said date. The first case, that of the Lumbermen's Mutual Insurance Company, is for the recovery of $3,000, a part of the entire loss, the other plaintiffs having paid different amounts, which, together with the amount paid by the plaintiff, make up this total of $14,339.36. The complaint alleged that the entire total damage amounted to some $15,000 or $20,000. None of the cases has ever been tried on its merits, and the first case is in this Court upon an objection by the defendant to the

court's order of amendment, as to parties and cause of action, which equally affects all the actions.

This case was brought to the October Term, 1917, of Wayne Superior Court, and complaint was filed 5 October, 1917. The Southern Railway Company filed answer 7 February, 1918, and the Norfolk Southern Railroad Company on 16 April, 1918. Both pleadings denied the allegations of the complaint, and otherwise answered to the merits of the case, and neither set up any objection on the ground of defect of parties. The cause was calendared for trial several times, but was continued from time to time for one side or the other. It having been postponed at August Term, 1919, for the plaintiff, the defendants insisted that the plaintiff pay the cost amounting to a large sum, which was ordered to be done. At November Term, 1919, the case was continued for the defendant, Norfolk Southern Railroad Company, no terms being imposed. After the case was continued the defendants entered a demurrer *ore tenus* to the complaint on the ground that since the complaint alleged the total value of the property destroyed by them to be over $15,000, and the plaintiff sought to recover only $3,000 as an insurer of the destroyed plant, that the plaintiff could not maintain a separate action. The plaintiff replied that the defect was one of parties plaintiff, and had been waived by the defendants when they filed answers to the merits of the case, without filing a written demurrer or setting up the objection in their answer. The court sustained the demurrer, and, immediately upon the court's announcement of its opinion, the plaintiff submitted a motion in writing to consolidate the five separate suits of the insurance companies, to make the A. T. Griffin Manufacturing Company party, and to allow the plaintiffs in the consolidated litigation leave to file amendments to their complaints, stating the total amount of loss and damage sustained by each plaintiff. In its discretion, the court allowed this motion. All this took place at one time on the same day in the courthouse at Goldsboro, during one and the same term of court. The plaintiff in this case, and the four other insurance companies, and the A. T. Griffin Manufacturing Company, the insured, have all joined in an amended complaint, which was filed 13 January, 1920, adopting and consolidating the former complaints. The insured, the A. T. Griffin Manufacturing Company, disclaims any recovery for itself, except that through it the insurance companies be reimbursed.

Both sides having reserved exceptions, the defendants appealed from the order of consolidation, and the plaintiff appealed from the decision of the judge sustaining the demurrer. It was stated on the argument here that if the defendants do not prosecute their appeal, or if they are not successful therein, the plaintiff will not press its appeal, which was taken only for its protection against a large bill of cost. The court

sustained the demurrer *ore tenus,* and dismissed the action, but, at the same term, allowed the plaintiff's motion to amend and to make new parties, and to consolidate the five pending actions, and from these orders the appeal was taken.

Battle & Winslow, D. C. Humphrey, and Kenneth C. Royal for plaintiff.

J. L. Barham, L. I. Moore, and A. C. Davis for defendants.

WALKER, J., after stating the facts as above: The judge sustained the demurrer and dismissed the action, but immediately allowed a motion by the plaintiff in the action to amend the same in the following particulars: First. To consolidate with this one four other actions, pending in the same court, and brought by the other insurance companies for the several amounts of insurance paid respectively by them. Second. To make the A. T. Griffin Manufacturing Company a party plaintiff to the consolidated actions. Third. To amend the complaint as to the total amount of loss, and the several amounts constituting the same, and to permit the Griffin Manufacturing Company to disclaim any further interest in the matter, it being assignor for value of the insurance company, and holding the legal title to the fund in the nature of a trustee for them. This motion, embracing all of the proposed amendments, was granted by the court, and the defendant excepted. It was not necessary to dismiss the action under the circumstances, but this is not material, as the judge, by allowing the motion of the plaintiff, virtually annulled that part of the judgment, or rather his subsequent order granting the motion was tantamount to striking out that part of the former judgment, and left none of it, except that part merely sustaining the demurrer. When the latter was sustained, whether rightly or wrongly, we will not now inquire, as it was proper to allow the amendments, and this overruled the demurrer.

The consolidation of the several actions was proper. One, and the main, object of our present procedure was to have all matters of controversy settled in one action, when this can be done without prejudice to the rights of any of the parties or to a fair and full trial and consideration of the case. Ample provision is made for accomplishing this purpose, Rev., secs. 409 to 414, both inclusive, and sec. 469.

The actionable injury done in this case was the destruction of the property of the Griffin Manufacturing Company, which was insured by some of the plaintiffs. They had to pay the loss thereon under their policies, and did so, and they now sue the same defendants to recover back what they had to pay, and to the extent they had to pay, the only difference between their several claims being one of form and not of

substance, and, as now appears, that difference consists only in the amounts due to each of them, which vary somewhat, leaving the general principle upon which they seek to recover common to all of them.

The rule governing consolidation of actions has been stated by this Court in a general way, and it was said in *Hartman v. Spiers,* 87 N. C., 28, that the cases in which, under the practice, consolidation may be ordered, seem to arrange themselves into three classes:

1. Where the plaintiff might have united all his causes of action into one suit, and has brought several, and these causes of action must be in one and the same right, and a common defense is set up to all. *Buie v. Kelly,* 52 N. C., 266.

2. Where separate suits are instituted by different creditors to subject the same debtor's estate. *Campbell's case,* 2 Blan. (Md.), 209.

3. Where the same plaintiff sues different defendants, each of whom defends on the same ground, and the same question is involved in each. *Jackson v. Schouler,* 4 Cowen (N. Y.), 78.

These may not embrace all the cases, but they serve to illustrate the rule by which the court is governed in ordering such union.

We held in *Blackburn v. Ins. Co.,* 116 N. C., 821, that the court could consolidate several actions brought on concurrent policies of insurance relating to the same property, and in *Monroe Bros. v. Lewald,* 107 N. C., 655, that where several proceedings in the nature of judgment creditors' bills are pending against the same defendant, and the same property is sought to be subjected, or where in either of such proceedings a receiver is appointed of property which is the subject of the other proceedings, the court may order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. It subserves the interest of the defendants that there should be this consolidation. They are subjected to the trial of but one action and if they fail in their defense, and the plaintiff recover judgment, the costs will be greatly reduced. They cannot be embarrassed in their defenses, so far as we can now see, and the issue in this case will be substantially the same in form and substance as the issue in each of the actions pending if they were tried separately. If it turns out, in the development of the case, that the issues are not the same as to each of the plaintiffs, so that the trial in one action may prejudice the defendant, we do not say that the court may not exercise its discretion as to amendments or a division of the actions so as to remedy the objection, but upon the record as it now appears, no such difficulty seems likely to arise, and we cannot see why the defendants should object to the consolidation. The exception that the amendment essentially changes the original cause of action is not well taken. The gravamen is the same, and the amendment merely

broadens the scope of the action so as to take in the whole controversy for the settlement of it in one action according to the spirit and intent of our code system; and to bring into the controversy all parties having an interest therein, and necessary to its final settlement. It is provided by Revisal, sec. 414, that "where a complete determination of the controversy cannot be had without the presence of other parties, the court may cause them to be brought in." We have held that a cause of action may be enlarged or amplified by amendment without necessarily altering its essential nature, and thereby bringing the case within the rule allowing an amendment where a really new cause of action is not pleaded or set up. *Simpson v. Lumber Co.,* 133 N. C., 95, where we said that amendments which only amplify or enlarge the statement in the original complaint are not deemed to introduce a new cause of action, and the original statement of the cause of action may be narrowed, enlarged, or fortified in varying forms to meet the different aspects in which the pleader may anticipate its disclosure by the evidence. 1 Enc. Pl. and Pr., 557-562. It has been declared to be a fair test, in determining whether a new cause of action is alleged in an amendment, to inquire whether a recovery had upon the original complaint would be a bar to any recovery under the amended complaint (*ibid.*, 556); or whether the amendment could have been cumulated with the original allegations. *Richardson v. Fenner,* 10 La. Ann., 559. Under either test, if applied to this case, the amendment was properly allowed.

In suits founded on negligence, allegations of facts tending to establish the general acts of negligence may properly be added by amendment. 1 Enc. Pl. and Pr., 563; *R. R. v. Kitchin*, 83 Ga., 83. An amendment can be allowed under our law when it does not substantially change the claim or defense (The Code, sec. 273), and the statement of additional grounds of negligence is not necessarily the allegation of a new cause of action or a substantial change of the plaintiff's claim. Many illustrations are given in the books of this distinction between an enlargement and amplification in the statement of the original cause of action, and a radical change by amendment of the cause of action itself. But here there is no substantial change in the cause of action, the object being to subject the liability of the defendant for damage to the reimbursement of the plaintiff, to the extent that they have paid their insurance on the property, they being subrogated to the right of the manufacturing company, whose property was destroyed by fire, and who had been paid the amount of the loss secured by the policies. The amendment merely brings in other parties interested in this fund, and whose presence is necessary to a complete settlement of the controversy. This prevents the trial of numerous actions when the entire matter can be determined in one action. The object of consolidating two or more actions is to

avoid a multiplicity of suits, to guard against oppression or abuse, to prevent delay, and especially to save unnecessary cost or expense; in short, the attainment of justice with the least expense and vexation to the parties litigant. Consolidation, however, is improper, where the conduct of the cause will be embarrased, or complications or prejudice will result, which will injuriously affect the rights of a party. 8 Cyc., 591. In this case there is an identity of interest, as to the plaintiffs and the cause of action, and the subject-matter or questions involved. They are the same, or substantially so. The court therefore did not err in granting the motion.

The court was also right in joining the manufacturing company as a party. It had the legal title to the claim against the defendants for the destruction of the property, and when the plaintiffs paid the insurance they were subrogated equitably, at least, to its right against the defendants to the extent that they had paid the loss on the property destroyed. But the question is settled in *Chicago, St. Louis, and New Orleans Railroad Co. v. Pullman Company,* 139 U. S., 79 (35 L. Ed., 97), where it was held that if an insurance company pays a loss to the owner of the property, and such owner brings an action against a party liable for the loss to recover the value of the property, it is no defense to the action that it is brought for the joint benefit of the owner and the insurance company by agreement between them, where the insurance company is entitled, upon the payment of the loss, by the terms of the policy, or equitably, to be subrogated to the rights of the insured against the person liable for the loss. *The Propeller Monticello v. Mollison,* 17 How. U. S., 153 (15 L. Ed., 68). As appears from the case last cited, the right of subrogation continues to exist until the insured can show that he has made satisfaction to the party justly entitled to recover the damages. *Powell v. Water Co.,* 171 N. C., 290, is to the same effect. It was there held that where the property upon which there is insurance is destroyed or damaged by the wrongful act of another, the liability of the wrong-doer is primary, and that of the insurer secondary, not in order of time, but in order of ultimate liability; the right of action is for one indivisible wrong, and this abides in the insured, through whom the insurer must work out his rights upon payment of the insurance, he being subrogated to the rights of the insured upon payment being made. *Hall v. R. R.,* 80 U. S., 367; *R. R. v. Jurey,* 111 U. S., 595; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.,* 117 U. S., 321; *R. R. v. Ins. Co.,* 139 U. S., 235. See, also, *Potter v. Lumber Co., ante,* 137.

And it is further said that the right of subrogation arises not out of the contract between the insured and the insurer, but has its origin in general principles of equity (14 Mod. Am. L., 159), and in this respect the standard form of policy, which has been adopted by legislative enact-

ment (Rev., 4760), in making provision for subrogation, is but declaratory of principles already existing, citing *Hall v. Railroad Co.*, 80 U. S., 367; *Railroad Co. v. Juery*, 111 U. S., 594; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S., 321 (20 L. Ed., 873); *Railroad Co. v. Ins. Co.*, 139 U. S., 235. It is held in *Phoenix Ins. Co. v. Erie, etc., Transp. Co., supra,* that when goods injured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by law of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such person. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In the court of common law, it can only be asserted in his name; and even in a court of equity, or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured.

Upon consideration of the whole case no error is found.

Defendant's appeal

Affirmed.

Plaintiff's appeal

Dismissed.

MARTHA J. HOLLOWELL v. JAMES H. MANLY.

(Filed 3 March, 1920.)

1. Deeds and Conveyances—"Heirs"—Fee Simple—Title.

A conveyance in trusts, made before 1879, which purports to convey the whole estate and interest of the grantor in lands in trust to the *cestui que trusts*, is of the fee simple title, though there are no words of inheritance associated with the beneficiaries.

2. Estates—Contingent Remainders—Deeds and Conveyances—Wills—Life Estates—Trusts—Naked—Estates—Title—Contingencies.

Upon a conveyance in trust to the sole use and benefit of the wife of H. during her life, and at her death to the surviving children of her marriage with H., and in case she should die leaving no child, "then in that case the property in this deed conveyed shall be held and owned by her hus-

band," H., and H. has died leaving his wife surviving without child of the marriage, and by will has given her "all the property of every description, both real and personal, that he may die possessed of": *Held*, the wife was entitled to an equitable life estate in the lands under the deed; to a contingent interest in fee under her husband's will, Rev., 3140, and the trust having become a passive one, both the legal and equitable title united in her, and her conveyance passed the fee-simple title to the lands.

APPEAL by defendant from *Bond, J.*, at the January Term, 1920, of WAYNE.

This is an action to recover the purchase money of a certain lot which the plaintiff contracted to sell to the defendant, and which the defendant agreed to buy, the defendant refusing to accept the deed of the plaintiff and pay the money, upon the ground that she could not convey the land in fee.

The lot of land formerly belonged to William T. Griffin, who, on 8 December, 1876, conveyed the same to A. B. Chestnut and his heirs upon the following trust:

"To have and to hold the within conveyed town lot upon the following conditions, and for the following uses and purposes, for the sole and separate use and benefit of Martha J. Hollowell, wife of James Hollowell, exclusive of the contract of her husband, or of any contract or liability that he may at this time be bound, or for any future contract or liability, but to be held for her sole and separate use and benefit during her life, and, at her death, to such children as she may leave surviving her, begotten of her present marriage, and to the issue of such as may be dead, such issue to take such share as the parent would have taken if living; and in case the said Martha J. Hollowell should die leaving no child surviving her, then in that case the property in this deed conveyed shall be held and owned by her husband, James M. Hollowell."

The plaintiff is the Martha J. Hollowell named in said deed, and she is now eighty-five years of age, and no children have ever been born of her marriage with James M. Hollowell, who died in 1912, leaving the following will:

"I give to my beloved wife, Mattie J. Hollowell, all the property of every description, both real and personal, that I may die possessed of.

"I desire that my wife shall pay my burial expenses and all other just debts that I may die owing as soon as convenient, out of any moneys or other property that I may own at my death."

The plaintiff has tendered to the defendant a deed conveying said lot, which he has refused to accept upon the ground that her title was defective.

His Honor held that the plaintiff was the owner in fee of said lot, and rendered judgment against the defendant for the purchase price thereof, and the defendant excepted and appealed.

Langston, Allen & Taylor for plaintiff.
Hood & Hood for defendant.

ALLEN, J. The deed under which the plaintiff claims conveys the fee-simple estate to the *cestui que trust,* although executed prior to 1879, and there are no words of inheritance associated with the beneficiaries, because it purports to convey the whole estate and interest of the grantor in trust for the *cestui que trust.*

A similar deed was construed in *Holmes v. Holmes,* 86 N. C., 207, in which the Court, although recognizing the principle that the word "heirs" was ordinarily necessary to convey a fee simple in an equitable as well as a legal estate, says: "The language of the instrument is—'to W. C. Bettencourt, etc., and their heirs, or the survivor of them, in trust for Sarah Moore.' The whole estate and interest of the bargainor passed to the trustee, and everything they took was charged with the trust in favor of the plaintiff. The trust was certainly intended to be coextensive with the legal estate, and as the one is in fee, so was the other intended to be, and so must we consider it to be."

It is also clear that the grantor in the Griffin deed had in mind Martha J. Hollowell, the children born of her marriage with James M. Hollowell, and James M. Hollowell, and that he intended to make provision for them, and for no other person or class, and if so, it conveyed an equitable estate to Martha J. Hollowell for life, and in the event she died leaving children born of her present marriage, to them in fee, and if she left no such children, to James M. Hollowell in fee.

This construction of the deed gives James M. Hollowell a contingent interest in the land which would pass by devise.

The Revisal, sec. 3140, provides that "Any testator may dispose of all real or personal estate which he shall be entitled to at the time of his death, and the power hereby given shall extend to *all contingent, or other future interest* in any real or personal estate, whether the testator may or may not be the person, or one of the persons, in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will," and it was held in *Kornegay v. Miller,* 137 N. C., 659, that a conveyance of a contingent interest for a nominal consideration vested an equitable title.

This last case is approved in *Beacom v. Amos,* 161 N. C., 367; *Hobgood v. Hobgood,* 169 N. C., 490; *Smith v. Witter,* 174 N. C., 618, and in other cases, the Court saying in the last case: "It is also established that contingent interests, such as those before us, will pass by deed," and if by a deed, certainly by a devise under the statute we have quoted.

Does, then, the will of James M. Hollowell pass this interest to his

wife? It purports to devise all of the property of J. M. Hollowell, real and personal, of which he was possessed, and in *Brantly v. Key* 58 N. C., 337, the Court, speaking of similar words in a devise, says: "The words are, 'all the estate or property which *she now possesses.*' 'Possesses' is frequently used in the sense of 'own,' 'entitled to'; and although the word 'now,' in connection with the fact that Mrs. Brantly's title was subject to a life estate, raises a doubt whether it was not intended to exclude the property to which she was only entitled in remainder, still the fact that there was no motive for not including in the settlement all the property or estate which she owned, inclines us to the conclusion that she did intend to convey all that she owned, in which sense 'possesses' was used," and in *Pate v. Lumber Co.,* 165 N. C., 187: "A conveyance of 'all the property I possess,' where there is no apparent motive for making an exception, conveys all property the party owned."

These two authorities seem to be conclusive, but others which sustain the position are *Hurdle v. Outlaw,* 55 N. C., 79; *Page v. Atkins,* 60 N. C., 270; *Detroit v. Moran* (Mich.), 7 N. W., 180; *Whitehead v. Gibbons,* 10 N. J. Eq., 230; *Hemmingway v. Hemmingway,* 22 Conn., 462.

The result of the last case as reported in 6 Words & Phrases, 5464, is as follows: "A devise of 'all my estate which I shall die possessed of' includes all the property of which he died the owner, the word 'possessed' being used to denote ownership, and not merely personal or corporeal occupation. *Hemmingway v. Hemmingway,* 22 Conn., 462, 472."

The case of *Church v. Young,* 130 N. C., 9, which is relied on by the defendant, is not in point, because there the Court was dealing with a possibility of reverter, which is not assignable, and not with a contingent interest, as in this case, which can be transferred by deed or devise.

"32 Henry VIII. No person could, at common law, take advantage of a condition except such as were parties or privies thereto. But this was remedied by a statute which gave the same rights to the grantee of a reversion as the grantor or lessee had. But note that this statute was confined to reversions strictly, and did not extend to a mere possibility of reverter, which arises where there is a conveyance in fee with the condition subsequent, that the estate shall be void upon a certain event, no beneficial interest being reserved to the grantor or devisor or his heirs. Thus, an estate to a railroad corporation in fee to be void unless the road be completed by a certain time leaves no reversion in the grantor, but a mere possibility of reverter, which is not assignable, and the condition can be enforced by the grantor and his heirs, but not by his devisee or assignee." 1 Mord. Lectures, 559.

"While it is true that contingent interests and choses in action are assignable in equity, and under our Code actions may be brought in the

name of the assignee, we find no case holding that a bare possibility of reverter comes within this principle." *Helms v. Helms,* 137 N. C., 209.

We are therefore of opinion that no children having been born of the marriage, the plaintiff was entitled to an equitable life estate, under the will, and her husband, James M. Hollowell, to a contingent interest in fee, which passed to the plaintiff under his will, and that she is now the owner in fee of both the legal and equitable estate, as the trust has become passive, and there are no longer any duties for the trustee to perform.

Affirmed.

WILKINS-RICKS COMPANY v. B. N. WELCH.

(Filed 3 March, 1920.)

1. Bills and Notes—Negotiable Instruments—Purchaser after Maturity—Equities—Notes.

The purchaser, after maturity, of a note secured by a chattel mortgage takes subject to the equities existing between the original parties.

2. Same—Corporations—Officers of Both Corporations—Notice.

Where a corporation is a purchaser of a note after maturity from another corporation, and knowledge of outstanding equities is had by the proper officer of the selling corporation, who occupies the same position with the purchasing one, it is also notice to the latter.

3. Principal and Agent—Unauthorized Agent—Ratification—Acceptance of Benefits—Bills and Notes—Mortgages—Substitution of Property.

The ratification of a transaction of a third person acting without authority as agent, may not be in part, for the repudiation thereof must be as a whole without acceptance of any of the benefits; and where the maker of a note secured by a chattel mortgage of mules has exchanged the mules for others in substitution of the mortgaged property, with a money payment to boot, and with knowledge thereof, the purchaser of the note accepts the cash thus paid, his so accepting the cash ratifies the entire transaction, for he may not repudiate it in part and ratify it in part.

APPEAL from *Connor, J.,* at the October Term, 1919, of LEE.

This is an action to recover two mules, which the plaintiff claims under a chattel mortgage executed by A. C. Stout to Wilkins-Lashley Company, and which, with the notes secured therein, were transferred to the plaintiff after maturity.

The chattel mortgage included the two mules and other personal property.

Before the notes and mortgage were transferred to the plaintiff, Stout traded the mules to the defendant and received in exchange two mules

and a check for $210, agreeing at the time to secure the release of the mules from the Lashley mortgage.

Stout saw L. P. Wilkins, who was secretary and treasurer of Wilkins-Lashley Company, and of the Wilkins-Ricks Company, told him of the trade with the defendant, and delivered to him the check for $210, which he accepted for the company, and which the company indorsed and received the money thereon.

L. P. Wilkins testified "that he was secretary-treasurer of the Wilkins-Ricks Company; that H. C. Stout came to see him some time during the early part of 1915, and gave him a check for $210, for which he credited him on his notes and mortgages; that Stout told him that he had traded mules and wanted him to change the papers; that he asked Mr. Palmer, president of the plaintiff company, to look at the mules, and Mr. Palmer reported that they were poor security, so he told Stout that he would not make the change; that he saw Stout several times afterwards, and had a good deal of correspondence with him about paying the mortgage; that he never agreed to release his original security; that Welch came in to see him several times, but always assured him that Stout was an honest man and would pay his debts, until finally Welch told him that the plaintiff had lost its rights in the case against him altogether by accepting his check; that he knew that the check for $210 was boot money, which Stout had received in a trade of the mules described in his mortgage."

His Honor held that there was no ratification of the sale to the defendant, and instructed the jury to answer the issue as to the ownership of the property in favor of the plaintiff, if they believed the evidence, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Seawell & Milliken for plaintiff.
Siler & Barber and Hoyle & Hoyle for defendant.

ALLEN, J. The plaintiff corporation and the Wilkins-Lashley Company are apparently one corporation, but, however this may be, notice to the officers of one would be notice to the other, as the officers of both are the same, and in any event the plaintiff, having taken the notes and mortgage after maturity, holds them subject to any defenses existing against the Wilkins-Lashley Company.

The real question, then, is, Could the Wilkins-Lashley Company maintain this action to recover the two mules? Clearly not, because it has accepted and appropriated to its own use, with knowledge of the facts, the check given by the defendant as a part of the purchase price of the mules.

A transaction entered into by one in reference to the property of another, although without authority, must be ratified or repudiated as a whole, and a benefit cannot be accepted under it without being subject to its burdens. *Rudasill v. Falls,* 92 N. C., 226.

"If with a full knowledge of all the facts a person ratify an agreement which another person has improperly made concerning the property of the person ratifying it, he thereby makes himself a party to it. He is in precisely the same position in this respect as if the original agreement had been made with him. And it has been held that one who knowingly accepts the benefits intended as the consideration coming to him under a contract, voluntarily made by another in his behalf, becomes bound by reason of such acceptance to perform his part of the contract." 9 Cyc., 387.

This principle was properly applied in *Norwood v. Lassiter,* 132 N. C., 57, to facts not so clear as in this case.

In the *Norwood case* land was sold under a mortgage, and the proceeds of sale were applied to the debt, and the excess paid to the guardian of the plaintiff. The guardian turned over the money to a receiver of the estate, and resigned, and after the plaintiff became of age the receiver settled with him and paid to him the part of the proceeds of sale in his hands. The plaintiff then brought his action to recover the land against the purchasers at the mortgage sale, alleging that the sale was illegal, and upon this phase of the case the Court says:

"It is admitted that so much of the proceeds of the sale as was necessary for that purpose, was applied to the payment of the debt due to Farmer, and the balance was paid to the guardian of the plaintiff, who was then a minor, and that part of that balance was expended by the guardian for the plaintiff's support and maintenance. The guardian resigned and a receiver of the estate of the minor was appointed, under the statute, and the balance of the proceeds of the sale remaining in the guardian's hands was paid to him. When the plaintiff attained his majority, the receiver settled with him and paid over the balance in his hands. The plaintiff admits the receipt of the money from the receiver, but he says that, upon taking it from him, he asked him if receiving the money would be a ratification of the sale made by W. C. Bowen, and that the receiver referred him to his attorney, a lawyer of high standing, who was familiar with all of the facts, and who advised him that it would not be a ratification of the sale, and that, acting upon the advice of the attorney, and with no actual intention of ratifying the sale, he accepted the money, and at the time of doing so he expressed his intention to bring this suit. This, it seems to us, is a fair and full statement of the facts to be gathered from the record in the case.

"It is perfectly clear that, notwithstanding what the plaintiff may have said, or what he intended at the time he took the money, which was a

part of the proceeds of the sale, his receipt of it was a ratification of the sale to the defendant and a complete waiver in law of all irregularities in the conduct of the sale, and of any lack of authority in Bowen, there may have been, for the reason assigned, that is, the absence of any request from Farmer to make the sale. When the plaintiff received the money he did something that was utterly inconsistent with his right to repudiate or disaffirm the sale."

This authority is affirmed as late as *McCullers v. Chatham,* 163 N. C., 64, in which appears the statement, pertinent here: "He could not accept the money derived from the sale, and at the same time reserve the right to repudiate the sale."

There must be a new trial, because of the erroneous instruction.

New trial.

STEVENS LUMBER COMPANY v. J .W. ARNOLD ET AL, TRADING AS GOUGH & ARNOLD BROTHERS.

(Filed 3 March, 1920.)

1. Removal of Causes—Transfer of Causes—Pleadings—Clerks of Court—Time to Plead—Application for Extension of Time—Orders.

The clerk of the Superior Court in which an action has been commenced has authority, upon request of the defendant, to extend the time for filing the answer beyond the twenty days allowed by the statute, Public Laws of 1919, ch. 304, but he may not, of his own motion, extend the time without the defendant's consent, beyond that requested, and bar him of his right to move the cause to another county when his motion is made before answer filed within the twenty days allowed him from the filing of the complaint, though under a misapprehension as to the statutory time he has requested the clerk to allow him two weeks in which to file his answer, the time to which he is entitled by the statute.

2. Same—Motions—Courts—Terms—Procedure.

Public Laws of 1919, ch. 304, confers no power upon the clerk of the Superior Court to hear and determine a motion to remove a cause to another county, and this must be done before the judge in term; and where the defendant has filed his motion to remove the cause before the clerk, and afterwards filed his answer within the statutory time, the motion is made in time, and the case should be transferred to the Superior Court for a hearing of the motion before the court in term.

3. Same—Arguments—Admissions.

Where a defendant has acted within the time allowed him by law to file his motion to change the venue of the action, and it appears that he has requested the clerk of the Superior Court for an extension of two weeks from the filing of the complaint in which to answer under a misapprehension of the statutory time allowed by ch. 304, Public Laws of 1919, the

extension of time by the clerk beyond that requested is not upon his application, and the failure of the defendant to specially controvert this upon the argument will not deprive him of his right.

CIVIL ACTION, heard before *Connor, J.*, at October Term, 1919, of LEE, on motion to remove the cause for trial to FORSYTH.

The motion was heard before the clerk upon a case agreed, as follows: The above entitled matter coming on to be heard before the clerk of the Superior Court of Lee County, upon demand for change of venue and removal to Surry County for trial, plaintiff and defendants agree on the facts as follows:

That summons in this action was duly issued on or about 4 October, 1919, and duly served upon the defendants; that the plaintiff is a corporation under the laws of Virginia, and the defendants, S. M. Arnold and W. S. Gough, are residents of Surry County, and J. W. Arnold resident of Yadkin County, North Carolina, said summons was returnable before the clerk of the Superior Court for Lee County, North Carolina, on 20 October, 1919, pursuant to provisions of chapter 304 of Public Laws of North Carolina, 1919; that on or about 14 October, 1919, the clerk of said court received from Henry H. Barker, Esq., attorney for defendants, request for extension of time in which to file answer, by letter, copy of which is hereto attached; that the undersigned clerk of this court brought to the attention of counsel for plaintiff the said request, and counsel for plaintiff consented and agreed that such extension of time be granted as was desired, and stated that an extension of a few days was desired to file complaint; the orders were made in said cause by said clerk granting such extensions as appear of record; that pursuant thereto, complaint was duly filed 23 October, 1919; that thereafter the defendants, on 29 October, 1919, made motion before the clerk for change of venue, and removal of said cause to Surry County for trial; that such motion was first made of said date before the judge presiding at the October-November term of court for Lee County, and by him declined for want of jurisdiction in that said cause was not then at issue and before said court at term.

Upon the foregoing facts, the said motion for removal of this cause, and change of the venue to Surry County, North Carolina, for trial, is refused and declined, and such removal denied.

T. N. CAMPBELL,
Clerk Superior Court, Lee County.

The judge denied the motion to change the place of trial, and settled the following case on appeal, which is necessary to be set forth for an understanding of the facts:

This cause came on for hearing upon appeal from an order of the clerk denying the motion of the defendants to remove this cause from Lee to

Surry County: The motion was heard by T. N. Campbell, clerk Superior Court of Lee County, on 29 October, 1919, upon a statement of agreed facts, set out in the record, as follows: That summons in this action was duly issued on or about 4 October, 1919, and duly served upon the defendants; the plaintiff is a corporation under the laws of Virginia, and the defendants, S. M. Arnold and W. S. Gough, are residents of Surry County, and J. M. Arnold resident of Yadkin County, North Carolina; said summons was returnable before the clerk of the Superior Court for Lee County, North Carolina, on 20 October, 1919, pursuant to provisions of chapter 304 of Public Laws of North Carolina of 1919; that on or about 14 October, 1919, the clerk of said court received from Harry H. Barker, Esq., attorney for the defendants, a request for extension of time in which to file answer, by letter, a copy of which is hereto attached; that the undersigned clerk of this court brought to the attention of counsel for plaintiff the said request, and counsel for plaintiff consented and agreed that such extension of time be granted as was desired, and stated that an extension of a few days was desired to file complaint; that orders were made in said cause by said clerk granting such extensions as appear of record; that pursuant thereto complaint was duly filed 23 October, 1919; that thereafter defendants, on 29 October, 1919, made motion before said clerk for change of venue and removal of said cause to Surry County for trial; that such motion was made on said date before the judge presiding at the October-November term of Lee Superior Court, and by him declined for want of jurisdiction in that said cause was not then at issue and before said court at term. The letter written by Harry H. Barker, attorney for defendants to Hon. T. N. Campbell, clerk Superior Court, dated at Elkin, N. C., 14 October, 1919, and referred to in the statement of agreed facts is as follows:

In re Lumber Company v. Gough & Arnold Bros.

DEAR SIR:—I note under your favor of 13 October that complaint has not yet been filed, and that you will send me a copy as soon as same is filed. Inasmuch as the complaint has not been filed, and we are some distance from you, and the defendants a part of the time being absent from town, I beg to make application for time to file answer when complaint is filed, that is, I would be glad if you would give me an extra two weeks from Monday, 20th, to file answer. As I understand the new law, this is discretionary with you, and I feel like we are entitled to this length of time, owing to the fact that the complaint would not be filed until the 20th instant, and under the law we would be given one week. If you will give me this additional time to file answer, and send me a copy of complaint when it is filed, I will consider it a favor, and it will be greatly appreciated.

The orders referred to in the statement of agreed facts, as appear in the record herein, are as follows:

In the above entitled cause, upon application of H. H. Barker, Esq., attorney for defendants, it is hereby ordered that the defendants be allowed to file answer to the complaint herein at any time on or before 20 November, A.D. 1919.

This 20 October, 1919.

T. N. CAMPBELL,
Clerk Superior Court, Lee County.

The original order, filed in the record, and signed by the clerk, is typewritten, and the date on or before which answer may be filed is "twentieth day of November, 1919." An inspection of the order discloses that a line has been drawn with a pen through the word "twentieth," and the word "third" is written over the word "twentieth." A line has also been drawn with pen through the word "third," and the figures "20th" written before the word "third" between the lines. As the order now appears, the figures "20th" are not canceled.

At the hearing of the appeal from the clerk, the original order was not exhibited to the judge; the judge did not understand that there was any controversy that the defendants had been allowed until 20 November to file answer.

The attorneys having failed to agree upon the case on appeal, the judge was requested to settle same, pursuant to the statute. The defendants then contended that the order of the clerk gave the leave to file answer on or before 3 November, and did not extend the time to the 20th. For the purpose of determining the facts in this respect, the judge inspected the original order, and considered affidavits and exhibits filed, and therefrom finds the following facts:

1. That after mailing his letter, dated 14 October, 1919, addressed to Hon. T. N. Campbell, clerk Superior Court, hereinbefore set out, Harry H. Barker, attorney for defendants, received through the mail a paper-writing, a copy of which is as follows:

I hereby grant an extension of two weeks from 20 October, 1919, to file answer in case of *Stevens Lumber Company v. Gough & Arnold* Bros.

This 16 October, 1919.

T. N. CAMPBELL,
Clerk Superior Court.

I have also made note of this extension on my docket.

2. That the name "T. N. Campbell" signed on the foregoing paper is not in the handwriting of the clerk of the Superior Court, but is in the handwriting of Miss Fannie S. Campbell, who is the daughter of clerk, and is employed as a clerk in his office.

3. That thereafter the said Harry H. Barker received a letter, copy of which is as follows:

SANFORD, N. C., October 24, 1919.

HARRY H. BARKER, Attorney, Elkin, N. C.

DEAR SIR:—I am herewith enclosing copy of complaint in case of Stevens Lumber Co. v. Gough & Arnold Bros.

Yours truly,
T. N. CAMPBELL,
Clerk Superior Court.
By FANNIE S. CAMPBELL, Office Clerk.

4. On 1 November, 1919, T. N. Campbell, clerk Superior Court, Lee County, at his request, delivered to Harry H. Barker, attorney for defendants, two sheets of paper, certifying under his hand that same "are a true and perfect copy of orders made in the case of Stevens Lumber Co. v. Gough & Arnold Bros."; that two of said orders, set out in said certificate, are as follows:

In the above entitle cause, upon application of H. H. Barker, Esq., attorney for the defendants, it is hereby ordered that the defendants be allowed to file answer to the complaint herein at any time on or before 3 November, 1919.

This 20 October, 1919. (Signed) T. N. CAMPBELL,
Clerk Superior Court, Lee County.

5. That the order set out in the certificate, dated 16 October, 1919, copy of which was received by H. H. Barker, attorney for defendant, was not signed by T. N. Campbell, clerk Superior Court, nor by any one at his special request, nor was same made by him; that said order was signed in the name of T. N. Campbell, by Miss Fannie S. Campbell, who is employed in the office of the clerk of the Superior Court.

6. That the only order made by T. N. Campbell, clerk Superior Court of Lee County, upon the application of H. H. Barker, attorney for defendants, is the order dated 20 October, 1919; that at the time this order was signed by the said clerk the word "twentieth," between the words "the" and "day," appeared therein; that Miss Fannie S. Campbell, after the same had been signed by the clerk, and while she was employed in said office, at the request of H. H. Barker, Esq., attorney for defendants, and without the knowledge of the clerk of the court, drew a line through the word "twentieth," and wrote over the said word "third"; that subsequently, at the request of the clerk, she drew a line through the word "third" and wrote the figures "20th" as they now appear in said order; that H. H. Barker requested Miss Campbell to make said

change in the order because he was of the opinion that there was a clerical error therein; that neither Mr. Barker nor Miss Campbell had any unlawful purpose in making said change in the order; that both were of the opinion that they were correcting a clerical error.

7. That during the argument of counsel on the appeal of defendants, which was heard on 29 October, 1919, in the courthouse at Sanford, N. C., the statement was made, and not controverted, that defendants had, upon request of their attorneys, been granted an extension of time to file answer to 20 November, 1919.

Upon the foregoing facts the court is of the opinion, and so holds, that:

1. That the order dated 16 October, 1919, granting an extension of two weeks from 20 October, 1919, within which to file answer is not a valid order.

2. That the order dated 20 October, 1919, is the only order made by the clerk upon application of defendant's attorney, for an extension of time within which to file answer, and that pursuant thereto the defendants had until 20 November, 1919, to file answer.

From the judgment of the court denying the motion, the defendants appealed, and assigned error as to certain findings of facts, and to the judgment, which will be mentioned later.

Williams & Williams for plaintiff.
H. H. Barker and Holton & Holton for defendant.

WALKER, J., after stating the case: If we give to the facts of this case their proper meaning, and consider carefully the documentary proof which is made a part of the case, the legal merits will the more easily be seen. It appears that the summons had been issued, and served, returnable 20 October, 1919, and that defendant's counsel wrote to the clerk of Lee County for "an extra two weeks, from Monday, 20th, to file answer." This is the literal form of the request for time. There was no general request for an extension of the time, but a special request, in order to be on the safe side, that he have two weeks from the return day of the summons to file the answer, which would be until 3 November, 1919. The clerk, instead of complying with this specific request, extended the time to 20 November, 1919, or about seventeen days beyond the time requested. The letter shows that this was the request, as the attorney states further on that, under the new law (acts of 1919, ch. 304), he had only one week from the filing of the complaint on the 20th, and that he needed two weeks from that date, or until November 3d, and, in addition, plaintiff's counsel only agreed to "such extension of time as was desired," which was two weeks from 20 October, or, if two from the time of actually filing the complaint, which was 23 October, it would be not later

than 7 November. The defendants had, under the act of 1919, ch. 304, sec. 3, 20 days after the return day of the summons, or 20 days after the filing of the complaint, if plaintiff's time for filing the same was extended.

It cannot be that, where the clerk and defendant's counsel resided in different places, widely separated, it was competent for the clerk to extend the time beyond the date requested by the former, without his consent, or even his knowledge, and beyond the time assented to by the plaintiff's counsel, because he granted only the time requested, or "desired," to use his language. The clerk, it may be conceded, has the power, under the new act, to extend the time for filing an answer, but he cannot do so of his own motion and contrary to a request for a stated time, so as to deprive the defendant of his right of removal, at least without his consent. The defendant's counsel, not having read the last statute in regard to procedure and pleadings, was not entirely sure as to the time for answering allowed him. He did not need any order for an extension of time to file his answer, as the two weeks requested by him were well within the statutory time, as the regular time would have expired about 4 November. The defendant did not need any extension, nor did he ask for one, in a technical sense, as he already had the time, which is mentioned in his letter, under the statute. Compliance with his request would be giving him only the time which he already had by law.

The motion for the removal was filed on 29 October, in the office of the clerk, and before the clerk, the complaint having been filed on the 23d, the defendant was therefore within his legal right when he filed his motion, regardless of any action of the clerk as to the time. The statute says that he shall file his motion before the time for answering expires, and this he did. After filing his motion with the clerk, he could then answer, and the case would then be transferred to the Superior Court, as was done, for a hearing of the motion before the court at term. No other procedure can be adopted since the act of 1919, as there is no provision in that statute giving the clerk power or jurisdiction to pass upon a motion, and this must necessarily be done as before, and, even as now, provided in the law, by the judge at term, otherwise by filing his answer, so that the issue may be raised and the case transferred, without first making his motion to remove, the defendant, by the very terms of the statute, would lose his right to remove, as his motion for that purpose is due before the answer is actually filed, or before the time for filing it has expired.

As to the order of extension made by the clerk, we are of the opinion that the judge should either have disregarded it altogether, as being a work of supererogation on the part of the defendants and the clerk—a

mere nullity, or he should have, himself, directed the order to be amended so as to comply with the request made by the defendant's counsel in letter. We do not understand why the time was extended to 20 November, 1919, unless by misunderstanding, or mistake, of the clerk, as to the motion and exact scope of the request, but his action, under the circumstances, is not to be taken as binding upon the defendants, nor imputed to them as a waiver of their right. Such a view of it would be entirely inadmissible, and would be very unjust to them. They have been diligent in filing their motion for a removal, and, in the further prosecution of the case, they have acted promptly and within the time allotted to them by law, and there is no valid, or sufficient, reason for any loss of their right to change the venue of this action.

It is said in the case not to have been controverted during the argument, that the defendants, upon the request of their attorneys, had been granted an extension of time until 20 November, 1919, to file their answer, and further, that the order of 20 October, 1919, extending the time to file the answer, is the only one made on the application of the defendant's counsel. This may all be true, first, because the extension to 20 November was granted "on the application of defendant's counsel," but not in response thereto, as it did not ask for such an extension, and in that sense only was the extension granted on his application, and, second, for the same reason was the order of extension the only one made, on his application. Besides, a party is not bound to controvert everything said on an argument on pain of losing his rights.

The fact remains, and clearly and palpably appears, that the clerk's order was made on a misapprehension of the true nature of the request as contained in the letter. The conclusion follows, and as we think logically, that the ruling of the court denying the removal was based upon something done erroneously by the clerk, and cannot be supported by anything authorized, or done, by the defendants which waives or forfeits their right to remove the case. Any other decision, it seems to us, would violate the spirit, if not the letter, of the statute. The case, therefore, does not fall within those cited by the plaintiff, where an unequivocal request for an extension of time was made, and granted, and where, too, in most, if not all, of the cases the request for removal was filed after the statutory period had elapsed. Here it was filed within the time, and only a few days after 20 October, 1919, when the complaint was filed, that is, on 29 October, 1919. We repeat that the judge should have corrected the record by having the order amended, so as to express what was actually done, and setting right a mere clerical error.

The words of *Justice Davis*, in *Shaver v. Huntley*, 107 N. C., 623, at 628, are peculiarly appropriate here, as he was treating of a similar question. He said: "If this be not so, the defendants have lost a right

without any fault, or neglect, of their own, and which they could not have prevented by any reasonable diligence or foresight." These defendants could not suppose that the clerk, of his own motion, would give an order for which they had not asked. Their counsel recognized the mistake as soon as it came to their knowledge. The right of removal, or change of place of trial, under our statute, is said to be of the same nature as that under the Federal law, or analogous to it, and that law is truly and accurately construed in *Bank v. Keator,* 52 Fed. Rep., 897, as follows: "A petition for removal filed after the statutory period has expired comes too late, even though filed within the time allowed for answering by order of the court, where such order is based on the stipulations of the parties." See, also, *Wilcox v. Ins. Co.,* 72 Fed. Rep., 803, and *Fox v. R. R.,* 80 Fed. Rep., 945; *Williams v. Tel. Co.,* 116 N. C., 558; *Howard v. R. R.,* 122 N. C., 944, where many similar cases are cited; *Riley v. Pelletier,* 134 N. C., 318; *Garrett v. Bear,* 144 N. C., 25; *McArthur v. Griffith,* 147 N. C., 545. In all these cases, where the right of removal has been denied because the motion came too late, that is, after the time for answering, under the law, and not under any special extension, had expired, we believe, so far as we have been able to discover, that the motion for the removal was made during the extended time, after statutory time had run its course, while here there was no extension requested by the defendants beyond the statutory limit, and the motion was actually made in time, that is, before the answer had been filed or the time for answering had elapsed.

The defendant has acted promptly within the meaning of the statute, and has done nothing to prejudice his right to remove.

Reversed.

M. ZUCKER AND S. ZUCKER, TRADING AS M. & S. ZUCKER, v. JONAS OETTINGER AND E. R. OETTINGER, TRADING AS J. & D. OETTINGER.

(Filed 3 March, 1920.)

Removal of Causes—Transfer of Causes—Motions—Clerks of Court—Pleadings—Answer—Superior Court—Jurisdiction.

Where proceedings are commenced by the issuance of a summons by a nonresident plaintiff in the wrong venue, before the clerk of the court, ch. 304, Acts 1919, the defendant may file his motion before the clerk before time to answer has expired, and thereafter file his answer, when the cause will be transferred to term; and the motion to remove then being properly before the judge, he has jurisdiction and authority to pass thereon, and order the cause transferred to the proper venue.

MOTION FOR REMOVAL, heard before *Connor, J.,* at January Term, 1920, of PITT. Motion was allowed, and plaintiff appealed.

S. J. Everett for plaintiffs.
No counsel for defendants.

BROWN, J. This is an action brought against the defendants to recover the balance due on account of goods sold and delivered.

The plaintiffs are residents of the city of New York, and the defendants are residents of the county of Wilson. Summons was issued by the clerk of the Superior Court of Pitt County, under chapter 304, Acts of 1919.

The plaintiff filed his verified complaint, and the defendant, before filing answer and before return time, appeared before the clerk and demanded removal of the same to the county of the defendants.

Thereupon the clerk made an order transferring the same to the Superior Court of Wilson County.

Whereupon the plaintiffs excepted, and clerk transferred the cause to the Superior Court docket, and at term time his Honor affirmed and approved the order of the clerk removing the same.

The plaintiff, being a nonresident, should have commenced the action in the county of Wilson, where the defendant resided. In such cases the nonresident plaintiff is not permitted to select any county in the State within which to bring his action. If he brings it in the wrong county it is subject to the power of court to remove the same to the proper county upon motion made in apt time. Clark's Code, sec. 192; *Stevens Lumber Co. v. Arnold,* at this term. Prior to the Act of 1919, the motion, as a matter of course, was made in the Superior Court, and could not be made before the clerk. Since that statute makes the summons and the pleadings to be filed before the clerk, it necessarily follows that the motion for a change of venue should be lodged with the clerk, because such motion to remove an action to another county cannot be made after answer filed. *Board of Education v. State Board,* 106 N. C., 83. The party desiring to move the cause can preserve his rights by filing his motion with the clerk before filing his answer. Such party can then file his answer. The clerk can transmit all the papers, including the motion, to the Superior Court. Whereupon the judge can pass upon the motion for a change of venue.

In this case the clerk granted the order of removal, and the plaintiff appealed to the judge, who heard the same at the January regular term of the Superior Court of the county of Pitt. His Honor, Judge Connor, ordered the cause to be removed. It is immaterial how the cause got before the judge in term time, whether by appeal or by a transfer. It is sufficient that it was rightfully there, and the judge had jurisdiction to pass upon the motion.

Affirmed.

ALEXANDER PRICE AND MARY H. PRICE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 3 March, 1920.)

Waters—Surface Waters—Damages—Negligence—Evidence—Railroads—Ditches—Culverts—Instructions.

Evidence tending to show that only since the construction of defendant's railroad track, without culverts, water had been ponded back on plaintiff's land, injuring his lands and crops, is sufficient to sustain a verdict for damages in plaintiff's favor, accruing three years next before the commencement of the action, it being negligence in either event, whether the damages were caused by the building of the road or the defendant's failure to keep its ditches clear or free from obstructions, etc.; and an instruction based upon evidence of this character embodying these principles, is correct.

CIVIL ACTION, tried before *Kerr, J.*, at November Term, 1919, of CRAVEN, upon these issues:

"1. Are plaintiffs the owners of the land described in the complaint? Answer: 'Yes.'

"2. Were the plaintiffs' lands and crops damaged by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"3. If so, what damages are plaintiffs entitled to recover? Answer: '$1,000.'"

The defendant appealed.

D. S. Ward for plaintiffs.
Moore & Dunn for defendant.

BROWN, J. We have examined the several exceptions to the evidence, and find no substantial error in them, certainly none that would justify us in ordering another trial, and we do not deem it necessary to discuss them. The prayer for instruction that upon the whole evidence, if believed, the jury should answer the second issue "No" was properly refused.

The plaintiff offered evidence tending to show that the drainage was sufficient before the railroad was constructed, but on account of the ditches being filled up, and there being no culvert, the water could not get through, and consequently injured the plaintiff's land and crops by backing up on it. This evidence, if believed, makes out a cause of action, and entitles the plaintiff to recover damages for three years preceding the commencement of the action. *Duvall v. R. R.*, 161 N. C., 448; *Roberts v. Baldwin*, 155 N. C., 276; *Davenport v. R. R.*, 148 N. C., 287.

The defendant excepted to the following charge: "If you find from the evidence, by its greater weight, that the railroad company failed and

refused to keep its railroad ditch, or ditches, along its right of way open and free of obstruction, and failed to keep the same clean in such a manner as to allow the water to flow along the same, and by reason of said negligence the flow of water was impeded, and the flow was turned upon the plaintiffs' land, and stood thereon, and sobbed and soured the same, and destroyed the plaintiffs' growing crops, and find that this endangered and probably caused the plaintiffs' injury and damage, then you would answer the second issue 'Yes.'"

The learned counsel for the defendant insists that this charge is erroneous, because there is nothing in it which requires the jury to find that the water had been diverted by the defendant from its natural course and turned upon the plaintiffs' land.

Taking the charge as a whole, we think it a very clear exposition of the law, and that the jury could not have misunderstood the question in controversy. It matters not whether the water was diverted from its natural course onto the plaintiffs' land by the construction of the road, or whether injury was caused by the defendant failing to keep its ditches on its right of way open and free of obstruction, so as to allow the water to flow along the same, and thereby the flow of water was turned upon the plaintiffs' land by reason of said negligence. Either would constitute, if established, such negligence as would render the defendant liable for the injury incurred within the principle laid down in the above cited cases.

No error.

CARRIE FIELDS, BY HER NEXT FRIEND, N. B. FIELDS, v. WALTER T. BRINSON.

(Filed 3 March, 1920.)

Seduction—Force—Pleadings—Allegations—Issues.

In an action by the father for seduction of his infant daughter, 16 years of age, upon allegation that the defendant "did seduce, debauch, and violently force the plaintiff, and had sexual intercourse with her against her will," two issues were submitted, (1) Did the defendant unlawfully and forcibly assault and carnally know and abuse the plaintiff as alleged? and (2) Did he wrongfully seduce and carnally know the plaintiff as alleged? *Held*, the issues were proper and an affirmative verdict upon either would have been legal, and the defendant cannot complain of a negative finding upon the first, acquitting him of civil liability for a capital charge, with an affirmative verdict upon the second issue. *Tillotson v. Currin*, 176 N. C., 481, cited and applied.

APPEAL by defendant from *Kerr, J.*, at November Term, 1919, of CRAVEN.

This is an action for damages brought by the plaintiff as father, and also as next friend, on behalf of his daughter, a girl 16 years of age, for seduction.

Verdict and judgment for the plaintiff; appeal by defendant.

Moore & Dunn and A. D. Ward for plaintiff.
D. L. Ward, E. M. Green, and Guion & Guion for defendant.

CLARK, C. J. The complaint avers that the defendant "did seduce, debauch, and violently force the plaintiff, and had sexual intercourse with her against her will," alleging injury, etc. The defendant tendered as the sole issue, "Did the defendant assault the plaintiff, Carrie Fields, and have intercourse with her forcibly and against her will, as alleged in the complaint?" The judge submitted two issues:

"1. Did the defendant unlawfully and forcibly assault and carnally know and abuse the plaintiff, as alleged?

"2. Did the defendant wrongfully seduce and carnally know the plaintiff, as alleged?"

The third issue was to damages. The defendant excepted to the submission of the second issue. The jury responded "No" to the first issue, and "Yes" to the second, and assessed damages.

If this had been a criminal action, the issue requested by the defendant would have made him liable to capital punishment if found in the affirmative, though the jury could have convicted of the lesser offense, as in this case.

There was no error in submitting the two issues, as they are both embraced in the allegation in the complaint, and the defendant cannot complain that under the issues submitted he was acquitted of civil liability for the capital charge.

Even if the charge and proof had been of the greater offense, and only the first issue had been submitted, the verdict as rendered would have been legal.

The whole matter has been so very fully and thoroughly discussed by *Allen, J.*, in *Tillotson v. Currin,* 176 N. C., 481, as to every phase of the action, that he has left nothing to be added. After quoting from 35 Cyc., 1296, to the above effect, and numerous cases there cited, *Judge Allen* said: "The Court says in the case from California (*Marshall v. Taylor,* 98 Cal., 55): 'Where a parent sued for the seduction of his daughter and consequent loss of services, and it appears that the intercourse was accomplished by force, such showing will not defeat the action, but will aggravate the injury.'

"In the case from Massachusetts (*Kennedy v. Shaw,* 110 Mass., 147): 'As the gist of the action is the debauching of the daughter, and the con-

sequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie, although trespass *vi et armis* might have been sustained. It would be no defense that the crime was rape and not seduction.'

"And in the Illinois case (*Leucker v. Steileu,* 89 Ill., 545; *S. c.,* 31 A. 104) it is said: 'We do not think there is any legal foundation for the claim that defendant could be held to less responsibility for forcible wrong than for seduction without force. The outrage is quite as great and the mischief quite as offensive.'

"We are, therefore, of opinion, on reason and authority, that the evidence of force would not justify the denial of the right to maintain the action, and that the motion for judgment of nonsuit was properly overruled."

Judge Allen also cites, to support the above, *Velthouse v. Alderink,* 153 Mich., 217; *Furman v. Applegate,* 23 N. J. L., 28; *White v. Murtland,* 20 A. R., 100; *Dorman v. Moore,* 5 Lans., 454; *Wooten v. Geissen,* 9 La. Ann., 523. To the same general principle are *S. v. Cody,* 60 N. C., 197; *S. v. Halford,* 104 N. C., 877.

The other exceptions in this appeal need no discussion. Indeed, the case was almost entirely one of fact, and as to the law it is completely covered by the very able opinion in *Tillotson v. Currin, supra.* The defendant cites no authority whatever in his brief.

No error.

S. P. HANCOCK v. ISRAEL DAVIS, MARY DAVIS, C. L. ABERNETHY, AND M. LESLIE DAVIS.

(Filed 3 March, 1920.)

1. Limitation of Actions—Adverse Possession—Husband and Wife—Title—Color—Possession.

A wife does not hold possession adversely to her husband while living on his lands with him as such, and therefore cannot acquire title against his by adverse possession under color.

2. Same—Descent and Distribution—Color.

The husband was in possession of the *locus in quo,* without deed, in 1870, listed the lands for taxes in 1871, failed to pay the same, and it appeared of record that his minor son was purchaser at the sale, and after his death in 1891 the former sheriff executed a deed in the name of the son, and conveyance was made in that name to the wife, who continued to live with her husband until 1912, the day of his death intestate,

without his having conveyed her the land, but retained possession of it as his own, for a sufficient time to ripen the title in himself: *Held*, the possession of the wife could not be adverse to the husband until his death, and such being for insufficient time thereafter, the land descended to the heir at law, subject to the widow's right of dower.

3. Appeal and Error—Harmless Error—Evidence—Canceled Mortgages.

Where the wife claims the lands of her husband after his death by adverse possession under a deed from a third person as color, which, under all of the evidence, is insufficient as to the length of time, the introduction of a canceled mortgage given by her husband and herself, does not bear upon the controversy, and will not be held for reversible error.

CIVIL ACTION, tried before *Kerr, J.*, at October Term, 1919, of CARTERET, brought to recover a lot of land in the town of Beaufort. His Honor charged the jury, if they believed the evidence, to answer the issues in favor of plaintiff. There was a verdict and judgment for plaintiff; defendants appealed.

J. F. Duncan and D. L. Ward for plaintiff.
C. R. Wheatley and Abernethy & Davis for defendants.

BROWN, J. The evidence shows that John E. Henry entered into possession of the lot in controversy prior to 1870, having no paper title thereto. He remained in possession up to his death in 1912. This action was commenced in 1917.

The lot was listed for taxes by John E. Henry in 1870, and sold for taxes on 7 January, 1871, and bid off in name of W. R. Henry, infant son of John E. Henry and brother of defendant, Mary Davis, who was John E. Henry's daughter. W. H. Henry was born in 1866, and died in 1873, according to the evidence. No deed was made to W. R. Henry at the time of sale, but the then sheriff, John D. Davis, gave a receipt for the taxes in name of W. R. Henry. On 18 April, 1891, John D. Davis, not then being sheriff, executed a tax deed to W. R. Henry for the lot.

The plaintiff offered in evidence a deed to Agnes Henry, dated 30 October, 1891, purporting to be signed by W. R. Henry for the lot, and probated upon the oath of John E. Henry.

On 21 October, 1913, Agnes Henry executed a deed for the lot to plaintiff Hancock. Agnes Henry was the third wife of John E. Henry, and was married in 1887. The defendant, Mary Davis, is the child of John E. Henry by a prior marriage, and, so far as the record discloses, is his only heir at law.

Plaintiff offered mortgage from John E. Henry and Agnes Henry to S. P. Hancock, 17 March, 1906, recorded in Book 5, page 303, which

said mortgage has been canceled and fully satisfied of record, as appears from the face of the same.

The defendants objected to the introduction of this mortgage on the grounds that it was not material, and was prejudicial; objection overruled, and defendants excepted. As the mortgage was duly canceled, we fail to see its bearing on this controversy.

We are of opinion that his Honor erred in refusing the motion to nonsuit, as in any view of the evidence plaintiff failed to make out title to the lot.

John E. Henry was in possession of the lot from prior to 1870 to his death. Assuming that he had acquired title by possession, no one except defendants have shown a title from him. Mary Davis was his only heir at law, and after her father's death, held the property subject to what dower right the widow may have had. The widow held no conveyance from John E. Henry.

The deed signed by W. R. Henry conveyed no title, for he died in 1873, some years before Davis executed the deed. If Agnes Henry had anything, she had only a paper-writing, which might be color of title. Assuming that it was, it never ripened into a good title by adverse possession.

John E. Henry lived on the lot up to date of his death in 1912, and died without either devising or conveying the property to his wife, Agnes. She did not hold adversely after she received the deed purporting to be executed by W. R. Henry. She resided with her husband on the lot, and was there as his wife, and could not hold adversely to him. This subject is discussed in the recent case of *Kornegay v. Price,* 100 S. E. Rep., 883, where it is said:

"It seems to be well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. But where the marital relations have been terminated by divorce or abandonment, it seems that one may acquire title from the other by adverse possession. 1 A. and E. Ency., p. 820, sec. 11. In *First National Bank v. Guerra,* 61 Cal., 109, it is held that a wife cannot claim adversely to her husband or those claiming under him so long as he remains the head of the family. It is held further, in *Hendricks v. Rasson,* 53 Mich., 575; 19 N. W., 192, that the husband cannot hold adversely to his wife premises belonging to her."

To same effect is 1 Ruling Case Law, p. 755, where more cases are cited. The author says: "It is well settled that neither a husband nor a wife can acquire title, by adverse possession as against the other, of land of which they are in joint occupancy during the continuance of the family relation."

According to the evidence, in any view of it, the title never passed out of John E. Henry until his death. The land then descended to defendant, Mary Davis, his daughter and only heir at law, subject to the widow's right of dower.

The motion to nonsuit is allowed.

Reversed.

ADA STOCKS v. JOSEPH LEE STOCKS.

(Filed 3 March, 1920.)

1. Actions—Service—Summons—Judgments—Independent Action.

Where, upon appeal from a demurrer to the complaint in an independent action to set aside a judgment for want of service of summons, it appears of record that the summons had not been served, the action will be sustained, for it is subject to collateral attack; otherwise it will not be, for then the remedy is by motion in the original cause.

2. Same—Fraud.

Where there are allegations in the complaint sufficient to establish the fact that a judgment sought to be set aside in an independent action was procured by the fraud of defendant, a demurrer thereto is bad, for the remedy is not by motion in the original cause.

3. Same—Evidence.

The complaint in this suit alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right: *Held*, sufficient for her to maintain an independent action to set aside the former judgment upon the issue of fraud, and also under our statute to remove the former judgment as a cloud upon her title. Rev., 1589.

CIVIL ACTION, heard by *Connor, J.*, on demurrer to the complaint, at January Term, 1920, of PITT.

This action was brought to set aside a judgment entered at August Term, 1914, of the Superior Court of Pitt County, in a case entitled "Joseph Lee Stocks v. Ada Stocks," which judgment was taken by default, and purports to vacate and set aside a certain proceeding in which dower was allotted to Ada Stocks, the plaintiff therein.

On 21 January, 1887, one Jesse A. Stocks executed to Redding S. Stocks, his son, a deed for twenty-five (25) acres of land in Pitt County,

N. C., the portion of said deed necessary to present the question of construction raised in this case being as follows:

"To have and to hold the same to him, the said Redding S. Stocks, during his natural life, and then to his bodily heirs, if there be any at his decease, and if there be none, then to the lawful heirs of the said Jesse A. Stocks. I, the said Jesse A. Stocks, do by these presents agree to warrant and defend the right and title of the aforesaid land to the said Redding S. Stocks, and his heirs forever, against the lawful claims of any person whatsoever."

Redding S. Stocks died and left him surviving one child, Jos. L. Stocks, the defendant in this action, and a widow, Ada Stocks, the plaintiff herein.

Shortly after the death of Redding S. Stocks, to wit, on 4 July, 1907, his widow, Ada Stocks, commenced a proceeding before the clerk of the Superior Court of Pitt County (which is referred to in the complaint filed in this cause), in which she asked that dower be assigned to her in the lands conveyed by Jesse A. Stocks to her husband, Redding S. Stocks, and covered by the deed above referred to; and in that proceeding it appears that the defendant, Joseph L. Stocks, who was at that time a minor, was regularly made a party defendant.

It further appears from the complaint that Jos. L. Stocks was represented in the dower proceedings by a guardian *ad litem,* and that the guardian *ad litem* filed an answer, on behalf of the said Jos. L. Stocks, his ward, in which he admitted that Ada Stocks, widow of Redding S. Stocks, was entitled to dower in the 25 acres of land conveyed to Redding S. Stocks in the deed referred to and made a part of the complaint in this cause.

It also appears that dower was assigned to Ada Stocks, the widow, in said proceedings by commissioners appointed for that purpose; that a report was filed by them allotting the dower, which was confirmed, and no exception was taken to the report by Jos. L. Stocks through his guardian *ad litem,* or in any other way, and that the judgment therein still is unreversed.

Plaintiff alleges in her complaint, among other things, that after dower had been allotted to plaintiff, as above set out, and after plaintiff had taken possession and the use and benefit of it, the defendant, Joseph L. Stocks, on 7 August, 1914, brought an action in the Superior Court of Pitt County for the unlawful and wicked purpose of defrauding plaintiff of her right of dower and her dower in the land above described. That the summons purports to be returnable to 24 August, 1914, but that no summons was ever served upon plaintiff in this case, and the defendant in that case, that notwithstanding the fact the summons was never served upon the plaintiff in this action, who was the defendant in

that action, there was a judgment entered at August term of court purporting to deprive plaintiff of her dower in the tract of land herein described, and adjudging Joseph Lee Stocks to be the owner in fee of the same, and entitled to the immediate possession of the same, which judgment was recorded in the clerk's office of Pitt County.

The plaintiff further alleges that she was never served with process of any kind in the second suit, which was just described, and that she was informed that some sort of proceeding had been brought against her, when she spoke to Joseph Lee Stocks about it, and he falsely, and with intent to deceive and defraud her, stated to her that there was nothing in it, that she could not be hurt as there was a proceeding commenced, but it had been withdrawn, but nothing had been done, or nothing would be done to prejudice her right, and finally, that "She need not bother herself any more about it." That as Joseph Lee Stocks was her son, she relied upon what he had said, as it was natural for her to do, and did not therefore give it any other thought or concern until a few months ago, when her son, Joseph Lee Stocks, took unlawful possession of the dower land against her will, and asserted title to it under what purports to be a judgment in the proceeding, which he told her did not exist, and had actually caused it to be adjudged that her husband, Redding S. Stocks, had only a life estate in the tract of land from which her dower was set off, when in fact he had a fee simple. That in the alleged proceeding, under which the defendant claimed his right to the possession of the land, it was not alleged that the former proceeding for dower was fraudulent, and no ground, either legal or equitable, was stated for setting aside the judgment therein.

The plaintiff prayed that the pretended judgment in Joseph Lee Stocks v. Ada Stocks be declared void and of no effect, and that the first proceeding, allotting her dower, be declared valid and in full force, and that she have immediate possession of her dower, which she acquired by and under the same. The defendant demurred, because the complaint does not state a cause of action for these reasons:

1. The deed executed by Jesse A. Stocks to Redding S. Stocks, attached to the complaint herein filed, and under which the plaintiff claims dower interest when properly construed, conveys to Redding S. Stocks, husband of plaintiff, a life estate only in said land.

2. That Redding S. Stocks, owning under said deed a life estate only, at the death of the said Redding S. Stocks the land described in the complaint vested absolutely in the defendant, the only child of the said Redding S. Stocks.

Wherefore, defendant demands that this action be dismissed, and that he recover his cost.

The court overruled the demurrer, and defendant appealed.

P. R. Hines and Julius Brown for plaintiff.
F. C. Harding and L. W. Gaylor for defendant.

WALKER, J., after stating the facts as above: This case naturally divides itself into three propositions:

1. It does not distinctly appear from the complaint in this action whether the fact, which is alleged herein—that no summons or other process was served on the defendant in the second of the three actions, it being the one which was brought to set aside the judgment in the dower suit—is shown on the face of the record in that case. Where it appears that summons has been served, when in fact it has not been, the remedy is by motion in the cause to set set aside the judgment, and not by an independent civil action, but when it appears on the record that it has not been served, the judgment is open to collateral attack. *Doyle v. Brown,* 72 N. C., 393; *Whitehurst v. Transportation Co.,* 109 N. C., 342; *Carter v. Rountree, ibid.,* 29; *Rutherford v. Ray,* 147 N. C., 253; *Rackley v. Roberts,* 147 N. C., 201; *Bailey v. Hopkins,* 152 N. C., 748; *Hargrove v. Wilson,* 148 N. C., 439; *Glisson v. Glisson,* 153 N. C., 185; *Barefoot v. Musselwhite, ibid.,* 208. There is an inadvertent expression in *Doyle v. Brown, supra,* at page 366, where it is said: "But the defendant's error is misunderstanding the scope of the action. It is an action in the nature of a bill in equity to vacate the said decree." The mistake is in calling it "an action," when in fact is was but a motion in the cause, as will appear from the record, and the statement of the case, which begins with these words, "Motion to set aside a decree," etc. With this correction the case is in perfect harmony with all the other decisions of this Court upon the subject. But this point is not so material, as there are other allegations, in this complaint, which confer jurisdiction of the case, and, too, it may hereafter appear that the record of the other does show that there was no service on, or appearance, or pleading by, the defendant in that case, who is plaintiff in this.

2. The plaintiff alleges that the judgment in the second action, which was brought to set aside the dower proceedings, was procured by fraud, which is set out in the complaint, the gist of it being that the defendant in this suit deceived her by a false statement to the effect that, while the action had been started, it had been wholly abandoned and withdrawn; that she need pay no attention to it, or give herself any anxiety concerning it, as she could not be harmed by it in the least, and thereby lulled her into a sense of security; that believing she was ignorant of what he was doing, or unconscious of what was going on at his instigation, he proceeded further in the action and finally obtained what purported to be a judgment, which he procured to be docketed, and afterwards entered upon the dower land and claimed the possession and ownership of it

under and by virtue of this false and fraudulent judgment. So that the judgment in the second action, and the proceedings leading up to it are attacked, and asked to be set aside for the fraud practiced upon her. This equity can be set up in an independent action, as is done here. *Hargrove v. Wilson,* and cases *supra.*

3. But there also are sufficient allegations to show that the judgment and the proceedings in that second action rest, as a cloud, upon the plaintiff's title to her dower, and her equity, or right to have it removed, and the true right, or title, determined and adjudicated, can also be asserted in a separate and independent action. *Hargrove v. Wilson,* 148 N. C., 439; *Bailey v. Hopkins,* 152 N. C., 748; *Rackley v. Roberts, supra.* It is elementary learning that a decree of a court having jurisdiction in a proceeding, in all respects regular on its face as to parties, cannot be attacked collaterally. It may be successfully impeached for fraud in an independent action brought for the purpose, when sufficient allegations of fraud are made and issues framed upon such allegations are submitted to a jury, and the fraud is established by the verdict. *Hargrove v. Wilson,* 148 N. C., 439, 440, and cases cited. A judgment, if invalid, would be such a cloud on the title, or such a direct menace to it, as to fall within the provisions of Revisal of 1905, sec. 1589, and Public Laws of 1893, as amended by Public Laws of 1903, ch. 763. These acts being remedial in their nature, should have a liberal construction in order to execute fully the legislative intention and will. *Christman v. Hilliard,* 167 N. C., 4.

It is not necessary to construe the deed of Jesse A. Stocks to Redding S. Stocks at this time, as defendant is estopped by the judgment in the dower suit to question plaintiff's title to the dower land, if that judgment stands. *Gay v. Stancell,* 76 N. C., 369. We will therefore wait until the validity of the judgment is determined before deciding that question, as it may never again arise.

Our conclusion is that the demurrer was properly overruled. The defendant will be allowed to answer the complaint. When all the facts are disclosed, upon the trial of the issues between the parties, the aspect of the case may be changed from what it now is, and other principles may have to be invoked. They do not arise at present, and we restrict ourselves to those before us.

Affirmed.

SOUTHERN STOCK FIRE INSURANCE COMPANY OF GREENSBORO v. RALEIGH, CHARLOTTE AND SOUTHERN RAILWAY COMPANY, AND NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 10 March, 1920.)

1. Actions—Consolidation—Insurance—Negligence.

Several insurance companies having commenced their separate actions against the same defendant for negligently setting fire to and damaging or destroying the lumber of the same insured; *Held*, the Court has the power, upon motion, to consolidate the several actions into one, and to make the insured a party under the authority of *Ins. Co. v. R. R.*, *ante*, p. 255.

2. Actions— Negligence—Insurance—Damages—Payment—Subrogation—Indivisible Actions—Agreement of Parties—Pleadings—Acquiescence—Demurrer.

The insured commenced action against a railroad company for its alleged negligence in damaging or destroying his lumber by fire, claiming such only as he had not received from the insurer, the total loss being in excess of that amount, and this insurer and others insurers of the same property brought separate actions, on the same day, each for the amount of this loss they had paid, under their several policies, to the same owner. *Held*, while such cause of action is ordinarily indivisible as between the insurer and insured against the tort *feasor*, the insured holding the title in trust for the insurer to which the former is entitled to subrogation to the rights of the latter, upon the payment of the loss sustained to the extent of the policy, these causes can be divided by the agreement or act of the parties, and it appearing that the plaintiffs have accordingly filed their pleadings, against the defendant for the same tort, the insured to recover the excess of his loss over the policies paid to him, thus dividing the action, and the defendant has answered to the merits instead of objecting to this division by plea or motion, it must be held to have acquiesced in and assented thereto. *Powell v. Water Company*, 171 N. C., 290, cited and applied.

APPEAL by plaintiffs from *Connor, J.*, at the November Term, 1919, of HARNETT.

This is an action by an insurance company to recover the amount of the insurance paid by the plaintiff to the Elm City Lumber Company on account of loss by fire alleged to have been caused by the negligence of the defendant.

1. On 11 November, 1912, a fire occurred which destroyed lumber owned by the Elm City Lumber Company, amounting in value to upwards of $20,000.

2. On 3 December, 1914, the Elm City Lumber Company and N. McLaughlin commenced an action against the defendant, returnable to the January Term, 1915, the plaintiffs therein suing for $8,165.83, $4,971.12 of which was claimed by N. McLaughlin, and $3,194.71 by the Elm City Lumber Company.

3. At the January Term, 1917, during the trial of the McLaughlin-Elm City Lumber Company case, which is reported in 174 N. C., p. 182, the plaintiffs therein were allowed to file an amended complaint, in which is set up the amount of insurance which had been paid to the Elm City Lumber Company, to wit, $11,678.49, by several insurance companies; and the plaintiffs also, in said amended complaint of January, 1917, alleged that the total value of the lumber was a great deal in excess of $20,000, the total value of the lumber at the plant at the time of the burning being alleged to be greatly in excess of $22,000, and the unburned portion being alleged to be of the value of $2,009.15.

4. At said January Term, 1917, the Elm City Lumber Company recovered judgment against the defendant for $7,500, and after appeal to this Court (174 N. C., p. 182), where the judgment of the lower court was affirmed, the defendant paid said judgment in full.

5. At no time prior to the November Term, 1919, has the plaintiff sought any relief except through the medium of its independent action.

6. The summonses in this, and the other three insurance company cases, and in the Elm City Lumber Company case against this defendant, were all issued 3 December, 1914.

The actions by the other insurance companies were, like this, to recover insurance paid to Elm City Lumber Company.

At November Term, 1919, the plaintiff in this action moved to consolidate all of the actions by the insurance companies, alleging that in the action by the Elm City Lumber Company against the defendant no recovery was sought or had on account of the insurance paid, and that the damages assessed was the difference between the insurance and the value of the property.

The judge was of the opinion that he had no right to consolidate this case with the other three cases named, and refused to grant the motion made by plaintiff's counsel. The plaintiff excepted.

The defendant then moved to dismiss the action on the ground that the complaint does not state a cause of action in that from said complaint it appears:

1. That the title to the lumber destroyed by fire was in the Elm City Lumber Company.

2. That the amount of insurance which plaintiff paid to said Elm City Lumber Company on account of said lumber destroyed was $2,975.75.

3. That the value of the lumber destroyed was $20,000.

This motion was allowed, and the plaintiff excepted and appealed.

Godwin & Williams, E. F. Young, and R. W. Winston for plaintiffs.
H. McD. Robinson and R. N. Simms for defendant.

ALLEN, J. His Honor was in error in holding that he did not have power to consolidate the several actions brought by the insurance companies. See *Ins. Co. v. R. R.,* at this term, opinion by *Walker, J.,* where the precise question is fully discussed and decided.

The same case also holds that the Elm City Lumber Company may be made a party, and that this would not change the character of the action.

If, however, the lumber company is not made a party, we are of opinion the consolidated action may be maintained, although the loss exceeds the insurance, if, as alleged, and so far not denied, the parties have in effect divided the action, and this follows naturally from the decision in *Powell v. Water Co.,* 171 N. C., 290.

It was held in that case:

"1. That the right of action to recover damages from the wrongdoer is in the insured, and that this right of action is one and indivisible.

"2. That upon payment of the insurance the insurer is subrogated to the rights of the insured as against the wrongdoer.

"3. That if the insurance is equal to or exceeds the loss, this right of subrogation extends to the whole right of action in the insured, and operates as an equitable assignment, and the action may thereafter be prosecuted in the name of the insurer.

"4. That if the insurance is less than the total loss, the right of subrogation still exists; but as the right of action is indivisible, and as the insurer has only paid a part of the loss, and is not entitled to an assignment of the whole cause of action, the action must be prosecuted in the name of the insured.

"5. That a release by the insured does not extinguish the right of subrogation."

Also, that the insured is a trustee, first, for reimbursement of his own loss in excess of the insurance, and then for the insurer to the extent of the insurance paid, and the Court adds: "They (the authorities) also seem to establish the proposition that if the insurance is less than the loss, and the insured has settled the difference between the insurance and the total loss with the wrongdoer, leaving unsettled only the amount of damages, measured by the insurance, that the cause of action for this damage would be in the insurer, for the reason that the insured has parted with all beneficial interest in the right of action, and, while the cause of action was indivisible, it has been divided by the act of the parties."

This recognizes the principle that while the right of action in the insurer is one cause of action, and indivisible against the will of the parties, it can be divided by the agreement or act of the parties, and it is also true that the rule against the splitting of causes of action is for

the benefit of the defendant, for the purpose of protecting him against a multiplicity of suits and unnecessary expense and costs, and may be waived by him.

If so, and it is made to appear that the Elm City Lumber Company, the insured, brought its action to recover its damages in excess of the insurance, and on the same day the insurance companies commenced their actions against the same defendant to recover the amount of the insurance paid by them, thus dividing the action in so far as they were able to do, and the defendant, instead of objecting to this division of the action by plea or motion, answered to the merits, it must be held to have acquiesced in and to have assented to the course taken by the several plaintiffs.

In *Fort v. Penny,* 122 N. C., 232, in which objection was made in the Superior Court to dividing a cause of action in order that actions might be commenced before a justice of the peace, it was held: "If the proofs had shown as matter of fact that the two demands appearing in the two summonses were one and the same transaction, and therefore indivisible," the defendant must file plea in abatement, and upon failure to do so the objection was waived, and upon the same principle this action may be maintained.

Reversed.

HENRY JONES v. D. L. TAYLOR & COMPANY, AND D. L. TAYLOR & COMPANY, INC.

(Filed 10 March, 1920.)

1. Employer and Employee—Master and Servant—Duty of Master—Safe Tools—Safe Place to Work—Negligent Orders—Evidence—Questions for Jury.

The employer's duty is to furnish his employee a reasonably safe place to do the work required under his employment, and reasonably safe tools and implements for that purpose, and not to expose him to unnecessary danger; and where he has been doing his work in a safe way, and changes to an unsafe one under the employer's direct order or that of his vice principal under a reasonable apprehension of discharge, if he refused to obey, and a personal injury is thereby proximately caused, without his own fault, the negligent order is an actionable wrong entitling him to recover damages; and where the evidence is conflicting an issue is raised for the determination of the jury.

2. Appeal and Error—Evidence—Nonsuit.

On an appeal from a judgment as of nonsuit upon the evidence, the Court will construe the evidence in the light most favorable to the plaintiff, if it tends to establish his contention.

3. Instructions—Trials—Negligence—Contributory Negligence—Assumption of Risks—Prayers for Instruction.

Where an action to recover damages for a personal injury alleged to have been caused by the defendant's negligence involves the elements of assumption of risks and contributory negligence, and defendant has duly tendered prayers for instruction thereon, it is not required that the judge should have used the language of the prayers tendered, if he has charged properly and adequately thereon in his own language, and in a manner that was substantially responsive.

4. Same—Proximate Cause—Appeal and Error.

Where in an action to recover damages for a personal injury alleged to have been caused by the negligent order of an employer, the elements of assumption of risks and contributory negligence are involved, requested prayers for instructions thereon are properly refused which omit therefrom all reference to the consideration of proximate cause.

5. Employer and Employee—Master and Servant—Negligence—Assumption of Risks.

The employer does not assume the risks of defective machinery and appliances due to the employer's negligence, unless the defect is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks.

6. Appeal and Error—Harmless Error—Trials—Counsel—Improper Remarks.

Improper remarks of counsel in the argument are rendered harmless where the judge promptly interposes and sufficiently cautions the jury in respect to them.

7. Instructions—Prayers for Instruction—Evidence—Verdict Directing—Nonsuit.

A request for an instruction that the jury return a verdict for the defendant if they believe the evidence, is substantially the equivalent of a motion to nonsuit thereon, in construing the evidence most favorably for the plaintiff.

CIVIL ACTION, tried before *Kerr, J.*, and a jury, at October Term, 1919, of CARTERET.

Plaintiff alleged that in March, 1917, he was employed by the defendant as a laborer, and was assigned to the work of "hooking stone" by using grab-irons to fasten to the stone so as to move them or lift them up. The work was being done at pier No. 1, Morehead City, where the stone was unloaded from the cars and placed on barges to be taken to Cape Lookout, where defendants were engaged in constructing a breakwater for the Government. Plaintiff was placed under the authority of Mr. Armstrong, who was the superintendent or "boss" of the work, and who ordered him to break certain stone with a hammer. Plaintiff objected to breaking stone in that way, because it was not the usual way, and, also, was dangerous, but the superintendent insisted that he do so,

or, if he refused, he would have "to quit the job." The plaintiff, while breaking stone under the said orders, was seriously injured, his face being hit by flying stone and his eye knocked out. He alleged that the tools and implements used for handling the rock under Mr. Armstrong's orders were not of the proper and usual kind, or in general and common use for such work, and that by the negligent acts and conduct of the defendants, represented by their superintendent, his injuries resulted.

The defendants deny that that plaintiff's injury was caused by any negligence on their part, but, on the contrary, by the plaintiff's own negligence. They alleged that the stones to be moved and loaded on the barges, for the purpose of being carried to Cape Lookout, were of different sizes, and some of them were not to be broken. The plaintiff, they allege, knew what was the manner of doing the work, and that there was no risk to him if he performed his work properly.

The small stones were not broken. The plaintiff had been engaged in this work before, breaking stone with a sledge hammer, where it was thin and flat. Mr. Wheatley was employed by the Government as an inspector, and would indicate by a X mark on the stone whether it was to be drilled or broken, and thereupon, following this marking by the Government inspector, a stone of 5 feet long, 12 inches wide, and 8 inches thick would be broken by a sledge hammer. This was the usual and customary way of breaking stone of this character. These facts were all well known to plaintiff, and he had been engaged in this work for two years or more. The hammer in use was in good condition, and the piece of stone on which the plaintiff was working was 8 feet long and 12 inches wide. Before that time it was broken by tapping it with a hammer, when it would break, and there was danger in that, because it cracked just like a piece of ice and would fly all about. They allege that plaintiff said: "I knew it was dangerous to work with a sledge hammer, but I worked at it for two years, then I quit." Mr. Wheatley indicated with a X mark stones that were to be broken. All plaintiff had to see was that the stone was of certain size. There was evidence to support each of the two contentions. The plaintiff, among other things, testified: "The stone was marked to be drilled, and the fellows worked so much of it until they could not get it broken up and had to put it out on a sidetrack, and they had to pay 'murrage on it. Mr. Armstrong said: 'Now the stone that comes in flat don't put it out there; take the hammer out here and break it.' They could not keep up with it. I was afraid to use the hammer, and threw it away, and one day there were three pieces left in the car. He called me and said: 'What are you doing sending that stone out there; take the hammer up there on the platform and don't you ever send a car out with one or two pieces.' Of course I was under him, and I got the hammer and, at half past

eight, I was breaking that stone, and a piece flew out, where the stone ought to have been drilled, and struck me in the eye and knocked it right out in my hand. I don't know whether Mr. Armstrong was on the job at that time or not, I am not sure, but he worked there most all of the time. I objected to breaking up the stone with the hammer; I told him it was dangerous; one boy had already got hurt with one, but I kept right on like he told me; if I did not I would have to get off the job. He told me if I did not I would have to get off the job. The piece of stone I was working on was about 12 inches wide and about 8 feet long. Mr. Wheatley, the Government man, would mark the stone, where they were to drill it, with an X, and it was against the law not to break a marked piece."

The judge charged the jury upon the various phases of the case, to which there was no objection, except in the respects hereinafter stated. The defendant asked for a nonsuit, and for an instruction that if the jury believed all the evidence the issues should be answered "No," which was refused. The defendant then requested that this instruction be given to the jury: "If the jury believe from the evidence that the defendant, D. L. Taylor & Company, furnished the plaintiff suitable tools to work with, and that the method of breaking the stone was a proper method for stone of this size, and that the plaintiff knew of the danger attendant on the work, and continued on the job for two years, he thereby assumed the risk and danger, and they should answer the second issue 'Yes.'" And also they asked for this instruction: "That if they found that the plaintiff knew of the danger, which was apparent to a prudent man, they will answer the second issue 'Yes.'" These prayers, it is stated in the case, were refused, except as given in the general charge.

The jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff guilty of contributory negligence, as alleged in the answer? Answer: 'No.'

"3. What, if any, damage is plaintiff entitled to recover? Answer: '$2,000.'"

Judgment on the verdict, and the defendant appealed.

Abernethy & Davis for plaintiff.
Moore & Dunn for defendant.

WALKER, J., after stating the case as above: The court properly denied the motion for nonsuit. There was, at least, conflicting evidence upon the issues as to negligence, and this carried the case to the jury.

If the plaintiff had been doing his work in a safe way, and defendant ordered him to do it in an unsafe way, with a threat to discharge him if he refused, and by reason of this negligent order he entered upon the work, which was dangerous, and was injured without his fault, he can recover his damages. It is the duty of the master not to expose his servant to unnecessary dangers while in the performance of the duty assigned to him, but, on the contrary, he is held to the exercise of ordinary care, and should use such care to furnish him with a reasonably safe place in which to perform his work, and with reasonably safe tools and implements with which to do it, and his failure, in this respect, if it proximately results in injury to the servant, constitutes an actionable wrong, for which he may recover his damages. *Marks v. Cotton Mills,* 135 N. C., 287; *Holt v. Mfg. Co.,* 177 N. C., 170; *Pressly v. Yarn Mills,* 138 N. C., 410. It is our duty, in passing upon a motion to nonsuit, to examine all of the evidence and to place the most favorable construction upon that which tends to establish the plaintiff's cause of action. The act of negligence here was in requiring the plaintiff to do his work in a dangerous manner, and forcing him to obey the negligent order of his superior by a threat to discharge him if he disobeyed it.

The instruction as to assumption of risk, which was requested by defendant, was substantially given, so far as was proper to give it, in the general charge of the court, which followed the approved precedents in such cases, and those in regard to contributory negligence. The instruction of the court was more complete and accurate than the prayers of the defendant, in the statement of the facts, and of the correct principle of law applicable to the facts, the prayers being somewhat deficient as to one or two of the material elements of assumption of risk and contributory negligence. They omitted all reference to proximate cause, *McNeill v. R. R.,* 167 N. C., 390; *Brewster v. Elizabeth City,* 137 N. C., 392. But, however this may be, the court charged properly and adequately upon this subject, although its language was different from that of the prayer. It was not required to adopt the words of the defendant's request, but could use its own form of expression, provided its instruction to the jury was substantially responsive to the prayer, even assuming that the latter was correct in itself. *Rencher v. Wynne,* 86 N. C., 268; *Graves v. Jackson,* 150 N. C., 383. It was held in *Pressly v. Yarn Mills, supra,* at p. 414: "While the employee assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employer's negligence. These are usually considered as extraordinary risks, which the employees do not assume, unless the defect attributable to the employer's negligence is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks." The court stated and

explained this rule and left it with the jury to find the facts and apply the rule to them. See, also, *Hicks v. Mfg. Co.*, 138 N. C., 319.

On the remaining question, the judge promptly interposed and sufficiently cautioned the jury as to the improper remarks of counsel, and thus rendered them harmless. *Greenlee v. Greenlee,* 93 N. C., 278; *McLamb v. R. R.,* 122 N. C., 862; *S. v. Hill,* 114 N. C., 780.

The request for an instruction to the effect that if the jury believed the evidence the verdict should be for the defendant was substantially the equivalent of the motion to nonsuit, and is covered by what we have said upon that part of the case.

No error.

S. L. MORRIS v. J. S. BASNIGHT, THE NEW BERN LUMBER COMPANY, ET AL.

(Filed 10 March, 1920.)

1. Principal and Agent—Corporations—Officers—Scope of Authority.

A contract to convey land executed by the general manager of a corporation and apparently within the scope of his powers and in the line of the company's business, is *prima facie* binding on the company.

2. Same—Benefits Accepted—Ratification.

A corporation which has acquired the timber on the owner's land under an agreement made by him with its secretary and general manager to reconvey the land to him for a certain consideration, having knowingly accepted the benefit thereof may not repudiate the authority of its officer, thus acting as its agent, and disaffirm the transaction.

3. Contracts to Convey—Divisible Contracts—Equity—Specific Performance— Consideration— Fraud—Corporations—Officers—Principal and Agent.

Semble, where a corporation is bound by a transaction made by its proper officer with a tenant in common, to purchase the timber growing on the lands at an administrator's sale, to make assets, that it would reconvey a defined portion thereof to the tenant in common, at an agreed price, the mere fact that a third person became a purchaser with the corporation, does not affect the owner's rights, when it is made to appear that the lands were paid for with the corporation's money, was bought in by its officer in fraud of the owner's rights, who thereupon executed a quit claim deed to his company for a nominal consideration: and *Held*, the contract being a devisable one, performance may be insisted upon by the tenant, he being ready and willing to perform the full obligations of the contract resting on him.

4. Contracts—Specific Performance—Vendor and Purchaser—Title—Bona Fide Purchaser—Equity—Deeds and Conveyances.

While equity will not decree specific performance of a contract to convey land when the defendant no longer has any title to convey, the

principle only applies when it is clearly established that the title has been passed to a *bona fide* purchaser, free from any and all equities arising to the plaintiff by reason of his claim and the suit brought to enforce it.

5. Lis Pendens—Pleadings—Corporations—Officers—Principal and Agent —Actual Notice.

Where the president of a corporation, the substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's rights, taken deed for same from his company, before complaint filed, he and his corporation are concluded from setting up the doctrine of *lis pendens* as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance.

6. Same—Statutes—Constructive Notice.

The doctrine of *lis pendens*, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given, pursuant to statutory regulations, Rev. sec. 462, which relates to constructive notice and its effect on subsequent purchasers, but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected.

CIVIL ACTION, tried before *Kerr, J.*, and a jury, at September Term, 1919, of CRAVEN.

The action was to enforce performance of a written contract to convey land, the same being in terms as follows:

"We, the undersigned, New Bern L. Company, hereby promise and agree with S. L. Morris that in the event we should bid off at the Adams sale the W. B. Morris (deceased) lands, and become the sole owners of same according to the terms of such sale, that we will sell or cause to be sold to the said S. L. Morris, for the sum of $100, the tract of land where he now resides, the same lands intended for him by his late father, W. B. Morris, containing about 14 acres, more or less.

"In witness whereof, we hereunto set our hands and seals, this 22 November, 1904. NEW BERN LUMBER CO. (Seal.)
By J. S. Basnight, Secretary."

The facts in evidence chiefly relevant to the controversy appear to be as follows:

On or about 21 November, 1904, the plaintiff, Southy L. Morris, was living on the small tract of land now in controversy, and which his father had laid off for him, and on which he had been living about 38 years. Plaintiff was tenant in common with his brothers and sisters in the lands of their father, W. B. Morris, deceased, which the adminis-

trator had begun a proceeding to sell. The defendant, New Bern Lumber Company, was anxious to buy the lands on account of the timber growing thereon, and J. S. Basnight, director, secretary, and general manager of said New Bern Lumber Company, and George Anderson, its superintendent of lands, were seeking to buy the interests of the several heirs before the administrator's sale. The secretary and general manager of the New Bern Lumber Company testified that Southy L. Morris, at and before the execution of the deed for his interest, required said secretary and general manager to give him the contract by which the New Bern Lumber Company agreed to reconvey to Southy L. Morris for the sum of $100 the 14 acres of land on which he was then living.

The administrator conveyed the Morris lands to Herbert C. Turner and W. B. Blades, 22 March, 1905, and Herbert C. Turner, president of the New Bern Lumber Company, paid the purchase money. The company was then owned by H. C. Turner, J. S. Basnight, and D. W. Basnight. On 5 April, 1905, J. S. and D. W. Basnight sold their stock in said company, and at the meeting of the stockholders on 4 April, 1905, J. S. Basnight resigned as director, secretary, and general manager, and D. W. Basnight resigned as director and vice president; H. C. Turner resigned as president, and was elected vice president, and Charles H. Turner was elected director and president of said company.

Some time after 5 April, 1905, H. A. Marshall, surveyor, was employed by the New Bern Lumber Company to survey the land which it had agreed to reconvey to plaintiff Morris, and sent George Anderson, its agent who looked after its lands, to show the surveyor the little piece which was to be cut off for Morris, so it could make a deed to Morris, and the company paid the surveyor for doing the work.

The surveyor made the survey, marked the land off (p. 25), and sent the description of the land to the company and to the plaintiff.

The plaintiff tried to get his deed. He went to Basnight and to Anderson and told them he had his $100 ready to pay for it. Basnight told him not to be in a hurry. Finally, Basnight told him to go to George Anderson; that Basnight and the company were at outs, and not to come to him any more.

The plaintiff continued in possession of his little piece of land after it was surveyed, and marked off for him by the defendant company's surveyor, built stables, outhouses, kept up the fences, and paid the taxes. Neither the New Bern Lumber Company nor Mr. Turner ever demanded rent or possession of the land.

25 October, 1908, Charles H. Turner, Mabel S. Turner, his wife, and Herbert C. Turner, his brother, owned the New Bern Lumber Company, and they continued to own all the stock until 1 February, 1913, when

Charles H. Turner was president, his son, R. G. Turner, was vice president, and C. H. Hall, an employee, was secretary.

27 April, 1912, Herbert C. Turner, for $10, executed a quit-claim deed to the New Bern Lumber Company for all of his right, title, and interest in the Morris lands.

The summons in this action was issued 4 November, 1913; served 6 November, 1913, and on 28 November, 1913, the New Bern Lumber Company, by deed executed by Charles H. Turner, president, purported to convey to Charles H. Turner all of its real and personal property of whatever kind, consisting in part of the lands, timber rights, and privileges, conveyed to said company by 28 deeds, conveyances, and contracts, from various and sundry grantors, including the quit-claim deed of Herbert C. Turner for his interest in the Morris lands. At the time of making this deed to himself, Charles H. Turner was president, his son, R. G. Turner, vice president, and C. H. Hall, employee, were the only stockholders in said company. Said R. G. Turner thinks he had one share of stock, and doesn't know how much Hall had then, but he hasn't any now.

The complaint was filed on 3 February, 1914, as of November Term, 1913.

The company has never been dissolved, and Charles H. Turner is now president and sole owner.

On issues raised by the pleadings, the jury rendered the following verdict:

"1. Did the New Bern Lumber Company, by its authorized agent, J. S. Basnight, contract and agree to convey the lands described in the complaint to the plaintiff, S. D. Morris? Answer: 'Yes.'

"2. Did H. C. Turner purchase this land for the New Bern Lumber Company, and take title to himself in fraud of plaintiff's rights? Answer: 'Yes.'

"3. Did the New Bern Lumber Company convey this land to C. H. Turner in good faith and for value? Answer: 'No.'

"4. Did the plaintiff demand a deed for said land, and offer to comply with the contract to convey the same to him? Answer: 'Yes.' "

Judgment on the verdict for plaintiff against defendant, the New Bern Lumber Company, and said defendant, having duly excepted, appealed.

E. M. Green, R. E. Whitehurst, and R. A. Nunn for plaintiff.
Guion & Guion and Moore & Dunn for defendant.

HOKE, J. The contract to convey is sufficient in form, and, having been executed by the general manager of the company, apparently within the course and scope of his powers, and in the line of the com-

pany's business, is *prima facie* binding on the company. *Bank v. Oil Mill,* 157 N. C., 302; *Clowe v. Imperial Pine Product Co.,* 114 N. C., 304. And, if it were otherwise, the company having acquired the plaintiff's interest in his father's land and the timber thereon under and by virtue of the act of the secretary and general manager, are concluded on this question. They will not be allowed to accept and hold the benefits of the agreement and repudiate the authority of the agent by whom it was made. *McCracken v. R. R.,* 168 N. C., 62-67; *Sprunt v. May,* 156 N. C., 388; *Watson, Trustee, v. Mfg. Co.,* 147 N. C., 469; 10 Cyc., 1073.

The objection of defendant, therefore, that no proper authority had been shown for making the contract, must be disallowed.

Recovery is resisted further by defendant on the ground that W. B. Blades, a third person and not a party, is the owner of one-half interest in the property. It is true the facts show that, at the time the property was acquired in pursuance of the agreement, said Blades joined Herbert C. Turner in the transaction, and that the deed was made to the two, but it also appears that the entire purchase price was paid by Turner, then president of the company, and evidently with the company's funds. Not only is it found by the verdict that said Turner bought the land and took title to himself in fraud of plaintiff's rights, but in recognition of the company's interest prior to the institution of the suit, and for a nominal consideration of $10, he executed a quit-claim deed, conveying to the company all his right, title and interest in the property. From these facts, therefore, it would seem that W. B. Blades has no such interest in the property as would prevent a conveyance of the entire title by a deed of defendant company. *Kuhn v. Epstein et al.,* 219 Ill., 154. Without decision on this question, however, it is the recognized principle in actions of this character that, in a divisible contract of the kind presented here, partial performance may be insisted on by the vendee, and assuredly so when it is made to appear that he is ready and willing to perform the full obligations of the contract on his own part. *Timber Co. v. Wilson,* 151 N. C., 154-157; *Kones v. Corell,* 180 Mass., 206; 25 R. C. L., Title, Specific Performance, sec. 51.

Again, it is contended that specific performance may not be awarded in the present instance because it appears that the defendant company has conveyed its entire interest to C. H. Turner, and is no longer able to convey any part of the title to the property. It is undoubtedly a correct position that equity will not do a vain thing and decree the making of a title when the defendant has no longer any title to convey, but the principle only applies when it is clearly established that the title has been passed to a *bona fide* purchaser, free from any and all equities arising to the plaintiff by reason of his claim, and the suit brought by

him to enforce it and is not available to defendant on the facts of this record. Not only is Charles H. Turner the president and substantial owner of the company and its assets, and presumably cognizant of plaintiff's rights under his contract, but he bought, pending this suit brought by plaintiff to enforce these rights. True he purchased and took his deed before complaint filed, and the doctrine of *lis pendens* as it ordinarily prevails only effects third persons who may take title after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or notice given pursuant to the statutory regulations, but this limitation only prevails as it may affect the purchaser with *constructive* notice. Our statute on the subject, Rev., 462, only purports to deal with constructive notice, and its effect on subsequent purchasers, but where one buys from a litigant with full notice or knowledge of the suit, and of its nature and purpose, and the specific property to be affected, he is concluded or his purchase will be held ineffective and fraudulent as to decree rendered in the cause and the rights thereby established. *Griswold v. Muller,* 15 Barbour, 520; *Corwin v. Bensley,* 43 Cal., 253-262; *Wick v. Dawson,* 48 West Va., 469-475; 25 Cyc., 1452; Bennett on Lis Pendens, 319.

One careful consideration, we find no reason for interfering with the disposition made of the case, and the judgment in plaintiff's favor is

Affirmed.

MARGARET D. NELSON v. DR. J. H. RHEM ET AL., TRUSTEES, ETC.

(Filed 10 March, 1920.)

Contracts— Lands— Sales— Consideration—Bonds—Face Value—Market Value.

A contract for the sale of lands "payable one-half in cash and one-half in Liberty Bonds" contemplates the acceptance of the bonds by the purchaser at their face value, and not according to their market value at the time, the latter interpretation having the effect of changing the express terms of the agreement, which the courts may not do in the absence of allegation or proof of fraud or mistake.

APPEAL by plaintiff from *Kerr, J.,* at the November Term, 1919, of CRAVEN.

This is an action to recover balance due on a contract for the purchase of a house and lot, tried on the following agreed facts:

"1. The plaintiff agreed to convey to the defendants a certain lot in the city of New Bern upon the payment of forty-two thousand five hundred dollars ($42,500), payable one-half in cash and one-half in Liberty Bonds.

"2. The plaintiff contends that she was to receive enough bonds at the market price to cover the $21,250, and the defendants contend the plaintiff was to receive bonds of the par value of $21,250.

"3. The defendants at the time of said contract had on hand bonds of the various issues that they had bought while the drives were on by the Government for the sales of the bonds and tendered the par value in said bonds.

"4. The difference between the par value and the market value of said bonds on 17 November, 1919, is considerably above $500, and the parties, by agreement, decided that the deed should be delivered, and that the cash part of the payment should be made, and that the $21,250 per value of bonds so tendered should be delivered, and that the question as to whether the test should be the par value or the market value should be submitted to the court, and if the court was of opinion that the market value was the test, it should render judgment for $500 and the costs in favor of the plaintiff, and that the defendants should pay to the plaintiff the actual difference, with the interest thereon from 17 November, 1919, which is much in excess of the $500, regardless of the fact that the judgment was only $500.

"5. The deed and the cash payment and the delivery of the par value of bonds have been complied with, and the parties submit to the court in this action the question as to the liability of the defendants to the plaintiff for the excess of the par value above the market value on 17 November, A.D. 1919, and agree that the rights of the parties depend upon the foregoing agreed facts."

His Honor held that the contract to pay $42,500, one-half in cash and one-half in Liberty Bonds, meant Liberty Bonds of the face value of one-half of the purchase price, and rendered judgment against the plaintiff, who excepted and appealed.

R. A. Nunn and Ward & Ward for plaintiff.
Moore & Dunn for defendants.

ALLEN, J. The contract of the defendant is to pay $42,500, "payable one-half in cash and one-half in Liberty Bonds," and if we were to adopt the construction of the plaintiff we would strike out of the agreement of the parties the terms of payment, leaving an unqualified promise to pay $42,500, as this would be the effect, if "one-half in Liberty Bonds" means the market value of the bonds.

The phrase "one-half in Liberty Bonds" means nothing if not bonds on their face, promising to pay $21,250, one-half the purchase money, and we have no right to change the contract, in the absence of allegation or proof of fraud or mistake, nor can we assume that the parties have inserted meaningless terms in their agreement.

In *Smith v. Dunlap,* 12 Ill., 189, the contract was to pay $131,480.52 in the indebtedness of the State of Illinois, and the Court says of the construction of the contract: "Where the promisor undertakes to pay a certain number of dollars in specific articles, such as grain, cattle, or other commodities, he must deliver the property on the day named in the contract, or he becomes absolutely bound to pay the sum stated in money. The sum expressed in the obligation indicates the true amount of the debt; and the other provisions is inserted for the benefit of the debtor, and relates exclusively to the mode of payment. If he does not avail himself of the privilege of discharging the debt in property, the obligation becomes a naked promise to pay the amount in money. But where the promisor agrees to pay a certain sum in bank notes, or other evidence of indebtedness, which purport on their face to represent dollars, and can be counted as such, the sum is expressed to indicate the number of dollars of the notes or evidence to be paid, and not the amount of the debt or consideration. The obligation is in fact but a promise to deliver so many dollars, numerically, of the securities described. If the debtor fails to deliver them according to the terms of the contract, he is responsible for their real, not their nominal value. Their cash value is the true amount of the debt to be discharged. And beyond the damages directly resulting from the breach of the contract, the creditor is not entitled to recover.

"The contract in question falls directly within the latter definition. It is an undertaking to pay a given number of dollars of the indebtedness of the State of Illinois. This indebtedness consists of obligations issued by the State, for the payment of specified sums of money to its creditors. The amount in dollars is expressed on the face of the instruments, and can be at once ascertained by inspection.

"In *Clay v. Houston's Admrs.,* 1 Bibb., 461, the expression in a note, 'thirty pounds in militia certificates,' was construed to mean that number of pounds in certificates as specified on their face, and not an amount of certificates equal in value to thirty pounds in specie. In *Anderson v. Ewing,* 3 Littell, 245, a note for the payment of 'eight hundred dollars, on or before 1 September, 1820, in such bank notes as are received in deposit at that time in the Hopkinsville Branch Bank,' was held to be a contract to pay eight hundred paper dollars of the description mentioned. The Court said: 'It is true, an instrument drawn, stipulating the payment of a certain number of dollars in cattle, wheat, or other commodities, is construed to mean so much of these articles as will amount to that sum in specie. But the reason of this is evident. The commodities themselves cannot be counted by dollars, as the name is never applied to them. But this is not the case with bank notes. They engage to pay so many dollars, and are numerically calculated by the

numbers they express; so that the expression "eight hundred dollars in bank paper" is universally understood to mean that much money, when the numbers expressed on the face of the note are added together, and not as including so many more, superadded, as will make them equal to eight hundred dollars in specie.' In *Phillips v. Riley,* 3 Conn., 266, a note for 'eighty-eight dollars in current bank notes, such as pass in Norfolk between man and man,' was decided to be a contract to pay bank-notes of the kind described, to the nominal amount of eighty-eight dollars. In *Robinson v. Noble's Admrs.,* 8 Peters, 181, in an action on an agreement to pay freight at the rate of one dollar and fifty cents per barrel, 'in paper of the Miami Exporting Company, or its equivalent,' the Court held that the specie value of the paper, when the payment should have been made, was the proper measure of damages. In *Hixon v. Hixon,* 7 Humphrey, 33, a note for 'one hundred dollars, in Georgia, or Alabama, or Tennessee bank notes, or notes on any good man,' was decided to be an obligation for the payment of that many dollars of the notes specified. In *Gordon v. Parker,* 2 Smedes & Marshall, 485, a note for 'five thousand dollars, payable in Brandon money,' was determined to be a contract to pay that number of dollars of the kind of money described. In *Dillard v. Evans,* 4 Pike, 175, the Court held a note payable in the 'common currency of Arkansas' to be a contract to pay so many dollars of the bank paper then current in the State."

Also, in *Easton v. Hyde,* 13 Minn., 90, speaking of a similar contract: "But a dollar is the measure of the value of U. S. bonds, so that the expression, payable 'in U. S. bonds,' is as universally and clearly understood as would be the expressions payable 'in bank bills,' 'in U. S. Treasury notes,' or 'in gold coin.' If these parties had intended that the bonds should be received at any other than their nominal value, they doubtless would have so provided in the contract."

The same principle is declared in *Lackey v. Miller,* 61 N. C., 27, in which the contract was to pay $71 "in current bank notes," of which *Pearson, C. J.,* says: "In our case the promise is, not to pay seventy-one dollars in United States coin, which may be discharged by paying enough current bank money to make up that amount in good money, but to pay seventy-one dollars 'in current bank money,' *i. e.,* seventy-one current bank money dollars; in other words, current bank bills calling on their face for seventy-one dollars, in the same way as where one promises to pay seventy-one dollars *in currency,* the meaning is to pay current notes calling on their face for seventy-one dollars, as distinguished from seventy-one dollars in United States coin, or, as is termed, 'in good money.'

"Any other construction of instruments like these would lead to the absurdity of supposing that the same words amount to a promise to pay in United States coin, *i. e.,* good money, and also to a promise to pay in

'current bank bills,' which are not good money; whereas, it is perfectly clear that the party intends to admit a debt of a given amount, not in United States coin, as in the case of *Hamilton v. Eller,* 33 N. C., 276, but only in current bank bills, *e. g.,* seventy-one current bank money dollars, or current bank bills, calling on their face for seventy-one dollars."

We are therefore of opinion on reason and authority that his Honor properly held that the plaintiff could not recover, as the defendant has paid to the plaintiff $21,250 in cash, and delivered Liberty Bonds of the face value of $21,250, which is all the defendants agreed to do.

Affirmed.

JAMES H. PUGH v. FRANK ALLEN.

(Filed 10 March, 1920.)

1. Deeds and Conveyances—Interpretation—Intent—Exception—Rule in Shelley's Case.

A deed to lands must be construed to effectuate the intention of the parties as expressed in the entire instrument, except when modified by some arbitrary principle of law, like the rule in *Shelley's* case, which, perhaps, is the only exception now prevailing.

2. Same—"Heirs"—Children—Defeasible Fee—Title.

A limitation of lands over on the death of the grantee or first taker without heir or heirs, and the second or ultimate taker is presumably or potentially one of the heirs general of the first, the term "dying without heir or heirs" on the part of the grantee, will be construed to mean, not his heirs general, but in the sense of children and grandchildren, etc., living at his death; and a gift to donor's son J., expressed upon consideration that in case he should die without an heir the gift shall revert to the sole use and benefit of donor's son T., "his heirs and assigns," upon the death of J. without issue, the estate would go to the heirs of T., since deceased, of the blood of the first purchaser, who would take under the deed.

3. Same—Repugnant Clauses.

An estate granted to J. defeasible in effect upon condition that at his death without issue, it would go over to the heirs of his brother T., both being the sons of the donor or grantor, is not repugnant to a latter expression of the writing granting the lands to J. "his heirs and assigns" in fee, in the sense that one is destructive of the other, for the limitation will be held as a qualification of the granting clause, showing the intent of the grantor was not to convey a fee simple absolute, but a defeasible fee in the lands to J.

CONTROVERSY without action, heard before *Kerr, J.,* at February Term, 1920, of SAMPSON.

From the facts submitted, it appears that plaintiff has contracted to sell and convey to defendant a tract of land in said county, and defendant

has refused compliance, alleging that plaintiff cannot make a good title; that the land belonged to Francis Pugh, who conveyed same to plaintiff, one of his sons; that Francis Pugh died, leaving four children, James H., Thomas K., Mary M., and Carrie M. Pugh. Mary M. Pugh intermarried with A. J. Fordham, and she and her husband are both dead without children; that Carrie M. intermarried with J. F. Wooten, and is now a widow with two living children; that Thomas K. has died without children, and without having married; that James H., the grantor in the deed, is a very old man and has never married. The court, being of opinion that, under the deed from his father and the attendant facts, plaintiff only had a defeasible fee in the land, entered judgment for defendant, and plaintiff excepted and appealed.

Kerr & Herring for plaintiff.
Butler & Herring for defendant.

HOKE, J. The validity of the title offered depends upon the proper interpretation of the deed from Francis Pugh to his son, James H., the plaintiff, in terms as follows, omitting irrelevant matter:

"That the said Francis Pugh, for and in consideration of the natural love and affection which he has unto the said James H. Pugh, and for the further consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledge, and for the further consideration that the said James H. Pugh does, at or before the signing and delivery of these presents, release unto my son Thomas K. Pugh all of his interest in the place whereon I now reside, given by Wm. Kirby, deceased, in his last will and testament to my wife, Mary Ann Pugh, and to the heirs of her body, and for the further consideration that in case it shall become necessary I reserve the right to draw from said lands such portion of the crops as I, the said Francis Pugh, shall deem sufficient for my sustenance. And for the further consideration that in case the said James H. Pugh should die without an heir the following gift shall revert to the sole use and benefit of my son, Thomas K. Pugh, his heirs and assigns. I, the said Francis Pugh, have given, granted, aliened, released, and confirmed, and by these presents do give, grant, alien, release, and confirm unto the said James H. Pugh, his heirs and assigns, all of that tract or parcel of land situated on the west side of the Six Runs, known as the Needham Stevens place, and bounded as follows:

. . . . . .

"Together with all the privileges and all things appurtenant thereto, and all the estate, rights, title, interest, except the above named reservations, of him, the said Francis Pugh, in and thereto.

"To have and to hold the said messuage and all the appurtenances thereof (on the conditions prescribed) to him the said James H. Pugh, his heirs and assigns, to his and their proper use and behoof forever."

It is the recognized position in this State that, except when modified by some arbitrary principle of law like the rule in *Shelley's case,* this perhaps being the only exception now prevailing, a deed must be construed so as to effect the intention of the parties as expressed in the entire instrument. *Brown v. Brown,* 168 N. C., 4; *Gilbert v. Shingle Co.,* 167 N. C., 286; *Jones v. Whichard,* 163 N. C., 241; *Triplett v. Williams,* 149 N. C., 394.

Applying the principle, it has been held in several of our decisions construing deeds of similar import that, in case of a limitation over on the death of a grantee or first taker without heir or heirs, and the second or ultimate taker is presumptively or potentially one of the heirs general of the first, the term "dying without heir or heirs" on the part of the grantee will be construed to mean, not his heirs general, but his issue in the sense of children and grandchildren, etc., living at his death. *Sain v. Baker,* 128 N. C., 256; *Francks v. Whitaker,* 116 N. C., 518; *Rollins v. Keel,* 115 N. C., 68. In *Sain v. Baker, supra,* the testator devised the property to his son, and, on the son's death without heirs, to his daughters, the word heirs in this limitation was held to mean children, and the present *Chief Justice,* delivering the opinion, said: "From the context, it is clear that the words without lawful heir or heirs are used in the sense of dying without issue or children, otherwise the limitation over to the daughters would have been in vain." And in *Francks v. Whitaker,* a similar ruling was made as follows: "Where a testatrix devised land to her son for life and after his death to his lawful heir or heirs, if any, and, if none, to the children of another son, the words 'heir or heirs' will be construed to mean his issue and not his heirs generally, and upon his death without issue the land goes to the children of the other son, all of whom were living at the date of the will." This, then, being the correct interpretation of the present deed, on the death of the plaintiff and grantee, James H. Pugh, without issue, which now appears to be altogether probable, the estate would go over to the heirs of Thomas K. Pugh, deceased, of the blood of the first purchaser, and these would take and hold not under the proposed vendor, but as heirs of Thomas K. under the deed from Francis, the grantor, and, on the death of James H., without issue living at his death, his deed would be of none effect. *Sessoms v. Sessoms,* 144 N. C., 121; *Smith v. Lumber Co.,* 155 N. C., 389.

We are not inadvertent to the position argued for plaintiff that the limitation over is void as being repugnant to the portion of the deed carrying to plaintiff an estate in fee, but putting aside this fact that the

limitation is stated as a part of the consideration of the deed and expressed in the form of a condition, the two clauses are not repugnant in the sense that one is destructive of the other, but, under the rule of interpretation heretofore stated, the limitation should be properly held as a qualification of the granting clause, and showing that the intent of the grantor is not to convey a fee simple absolute, but a fee defeasible, as his Honor ruled. *Jones v. Whichard, supra.*

We find no error in the record, and the judgment of the Superior Court is affirmed.

No error.

J. H. AMAN v. DOVER AND SOUTHBOUND RAILROAD COMPANY.

(Filed 10 March, 1920.)

1. Courts—Justice's Courts—Pleadings—Statutes—Amendments.

The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant." Rev., 1463, and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the Court to amend either in substance or form, at any time before or after judgment in furtherance of justice. Rev., 1467.

2. Pleadings—Interpretation—Refinements—Statutes.

The ancient refinement of pleading more often defeated than promoted justice, and have long since been abolished by statute, Rev., 505, 507, 509, 512; and pleadings must now be liberally construed, disregarding mere form, to determine their effect. Rev., 495.

3. Pleadings— Justice's Courts— Summons— Demand— Motions—Bill of Particulars.

In an action brought in a justice's court to recover against a railroad company damages for loss of a part of a shipment of goods, the summons is sufficient which includes, in the amount demanded, the freight the plaintiff had paid, in the expression "due by goods lost on company's road," as the freight paid would be as much a loss as the goods, especially when the defendant had had the itemized statement filed by the plaintiff for many months, and failed to ask for a more definite statement of the claim or for a bill of particulars. Rev., 494, 496.

4. Carriers of Goods—Bills of Lading.

An instrument issued to the consignor by the carrier, receipting for the goods delivered to it and agreeing to transport the same to their destination, is a bill of lading.

5. Same—Omission to Issue Bills of Lading—Relationship of Consignor and Carrier— Interstate Commerce— Statutes— Regulations— Interstate Commerce Commission.

Where a bill of lading has not been issued by the carrier or a receipt of goods for transportation, the rights of the shipper and the duty of the

carrier are to be determined by the common law, and their relationship of carrier and shipper may be created without any written bill of lading, and while for an interstate shipment a written bill of lading should always be issued, as evidence of the contract of the parties, yet, if the same is omitted, the requisite stipulations of the bill or contract, as prescribed by the Federal statutes, or valid regulations of the Interstate Commerce Commission, will attach and govern the rights of the parties.

6. Carriers of Goods—Carrier and Consignor—Evidence—Weight of Evidence—Questions for Jury—Trials.

Evidence that the plaintiff paid the freight charges to the carrier on a shipment, which was received by the carrier, and that a detailed statement of the whole transaction was filed with the carrier charging it with having accepted the goods; that they remained in its possession for months before and after the action was brought, without its objection or denial of the facts in any manner, is sufficient to establish the relation of consignor and carrier between the parties, and to permit a recovery for a part of the goods which was lost, the weight of the evidence being for the jury to determine.

CIVIL ACTION, tried before *Daniels, J.*, and a jury, at December Term, 1919, of ONSLOW.

Plaintiff sued before a justice of the peace for the value of goods shipped by the defendant's line to him at Richlands, N. C., from Charleston, S. C., which were lost in transit, and for the freight paid by him on the same. He stated in his complaint the total sum due, and did not separate the items, that is, goods and freight charges which were paid. Judgment was given against him in the justice's court, and he appealed. In the Superior Court he testified that he ordered the goods from C. D. Francke & Company of Charleston, S. C., and all were received but the steel tires, described as "a bundle of rods." That he had demanded the rods several times, when he filed his claim for loss, which included, in the total, the amount paid by him as freight. In what is called in the case the receipted "freight bill," these goods are stated as "astray" or lost. The claim he filed with the defendant consisted of the statement of loss, the freight bill and a bill of lading signed by C. D. Francke & Company, but not by the railroad company. These papers were delivered to the defendant and kept by it for many months without any objection, so far as appears, to its form or substance, or any dispute of the claim; that only a part of the goods arrived at Richlands, and were delivered to him.

The court ordered a nonsuit as to both items of the claim for loss, because, presumably, the bill of lading was not signed by the railroad company at Charleston, S. C., and the claim for freight charges paid by him was not distinctly pleaded, but was included with the loss of the goods without any separate designation, the form of the complaint being

"for the nonpayment of so many dollars," with interest, "due by goods lost on said company's road and demanded by him." Plaintiff excepted, and appealed from the judgment.

Duffy & Day for plaintiff.
T. D. Warren and Ward & Ward for defendant.

WALKER, J., after stating the case as above: The pleadings in a justice's court are not expected to be in any particular form, or to be drawn with technical accuracy. They are required only "to be such as to enable a person of common understanding to know what is meant." Rev., 1463; and "no process, or other proceedings, shall be quashed, or set aside, for want of form, if the essential matters are set forth therein," and ample powers are given to amend either in the form or substance, at any time before or after judgment, in furtherance of justice. Rev., 1467. The ancient refinements of pleading, which more often defeated justice than promoted it, have long since been abolished, Rev., 505, 507, 509, 512, and it is now the law that pleadings, for the purpose of determining their effect, must be liberally construed, disregarding mere form, Rev., 495; *Blackmore v. Winders,* 144 N. C., 212; *Brewer v. Wynne,* 154 N. C., 467. Examined in the light of these statutes, we do not see why the item of freight charges paid by the plaintiff was not sufficiently set up in the summons. It was included in the amount stated to be due, and in the prayer for judgment, but was not distinctly called by its name, though it was embraced by the words "due by goods lost on the company's road." It was paid as freight on these goods, and, if not paid back to plaintiff, would be as much lost as the goods themselves, and it was the loss of the goods that entitled the loss of the freight money. It would be requiring too much if we should hold otherwise, and especially so when it appears that the defendant had the itemized statement of plaintiff, which was filed with his claim, many months before the trial and even before suit was brought. Besides, the defendant never asked for a more certain and definite statement of the claim, or for a bill of particulars, as he could have done. Rev., 494 and 496; *Allen v. R. R.,* 120 N. C., 550; *Conley v. R. R.,* 109 N. C., 692; *Blackmore v. Winders, supra.* As to the other question: An instrument issued by the carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination, is a bill of lading. Of course it is not essential that a bill of lading be issued, for in the absence of any such instrument the rights of the shipper and the duty of the carrier are to be determined by the common law. 6 Cyc., 417. It may, therefore, for the sake of discussion, be conceded that the paper signed only by Francke & Com-

pany was not a bill of lading. 6 Cyc., 417, note 80, and cases cited. Such a bill was not required to charge the defendant as carrier, as we have seen, and as will also appear by reference to the following authorities. 1 Hutchinson on Carriers (Math. & D.), sec. 152; 10 Corpus Juris, sec. 251, pp. 192 and esp. 193; *Berry v. R. R.*, 122 N. C., 1002; *Wells v. R. R.*, 51 N. C., 47; *McRary v. R. R.*, 174 N. C., 563. 1 Hutchinson on Carriers, *supra*, says: "No receipt, bill of lading, or writing of any kind is required to subject the carrier to the duties and responsibilities of an insurer of the goods. As soon as they are delivered to him for present carriage, and nothing necessary to their being forwarded remains to be done by the owner, the law imposes upon him all the risk of their safe custody as well as the duty to carry as directed. He is regarded as exercising in some sort the functions of a public office, and the law is said to impose upon him his duties and obligations upon this ground, as well as upon the ground of contract, and as soon as the delivery to him and his acceptance are shown, the law imposes the duty and responsibility in virtue of his public employment. In other words, his liability does not rest exclusively upon contract, however much it may be qualified or limited by express agreement." We have held it to be settled law that the relationship of carrier and shipper may be created without any written bill of lading. *Davis v. R. R.*, 172 N. C., 209; *Smith v. R. R.*, 163 N. C., 143. And it is also held with us that in case of an interstate shipment, while a written bill of lading should always be issued, as evidence of the contract between the parties, yet, if the same is omitted, the requisite stipulations of bill or contract, as prescribed by the Federal statutes, or valid regulations of the Interstate Commerce Commission, will attach and govern the rights of the parties concerning it. *R. R. v. Muggs*, 202 U. S., 242; *Peanut Co. v. R. R.*, 166 N. C., 62; *Bryan v. R. R.*, 174 N. C., 177; *McRary v. R. R.*, 174 N. C., 563. This Court has held in the *Bryan case, supra*, as stated in the second headnote: "In order to obtain uniformity of carriage contracts for interstate commerce, the Carmack Amendment to the Interstate Commerce Act requires the carrier to issue a bill of lading upon terms fixed by the Interstate Commerce Commission; and while a parol contract of shipment is upheld as binding, the uniform contract yet fixes its terms." The only question, then, is whether the package of goods was shipped, or, in other words, accepted by the carrier for transportation from Charleston to Richlands, and was it lost. There were facts and circumstances which constituted some evidence in support of this allegation, and which should have been submitted to the jury, with proper instructions from the court. That plaintiff paid the freight charges on his entire order of goods, and that the carrier accepted the same were circumstances tending to show receipt of the goods by the railroad company, for the company had no right to

charge for more than it actually received for shipment, and it is not at all probable that it did so, and it offered no evidence itself to the effect that it did so charge. The retention of the claim filed with it for so long a time, without objection to it or denial of it, when it exhibited a detailed statement of the whole transaction, and substantially charged it with having accepted the goods for shipment, was another circumstance to be considered, and there may be others, but it is unnecessary to pursue this discussion further. It must not be inferred that we are even intimating any opinion upon the weight of the evidence, but only stating that there is some evidence upon the issues in the case. Its weight is for the jury to pass upon.

The judgment of nonsuit was erroneous, and will be set aside. The case must be submitted to a jury.

Error.

GULF REFINING COMPANY v. J. T. McKERNAN, BUILDING INSPECTOR OF THE TOWN OF SANFORD.

(Filed 17 March, 1920.)

1. Mandamus—Public Officers—Municipal Corporations—Unlawful Purposes.

Performance of a mere ministerial duty on the part of a public official, when arbitrarily refused, may be enforced by *mandamus* and, under some conditions, the issuance of a building permit, under our statutes applicable, may come within the principle, but not for the performance of an unlawful act or one in furtherance of an unlawful purpose.

2. Same—Gasoline—Oils—Governmental Powers.

Police regulations as to the erection of structures for the only purpose of carrying on the business of selling and distributing kerosene oil and gasoline and other petroleum products is within the governmental powers ordinarily possessed by cities and towns.

3. Same—Building Inspectors—Ordinances—Defenses—When Available.

A permit was requested of a city to erect structures therein to carry on the business of distributing and selling kerosene oil, gasoline and other petroleum products, and pending investigation by the proper city authorities, a proceeding for *mandamus* to compel the issuance of the permit was brought against the building inspector, which was tried in the Superior Court, the judgment appealed from and remanded by the Supreme Court for further findings of fact as to the existence of certain ordinances relative to the inquiry, whereupon two ordinances passed by the proper city authorities forbidding, among other things, buildings of this character, "nearer than one thousand feet from any dwelling," etc., which forbid the erection of the structures at the proposed location, having been put in evidence and included in the findings of fact. *Held*,

the ordinance was a valid one and thereunder the building of said structures at the place being unlawful, the *mandamus* must be denied on the second trial; and *Held further*, this defense was available to the city when brought to the attention of the Court, though the ordinances had been passed since the institution of the suit.

APPLICATION for mandamus, heard before *Connor, J.*, at October Term, 1919, of LEE.

The application is for a writ commanding the building inspector of the town of Sanford to issue a permit to plaintiff to erect certain structures in said town for the purpose of carrying the business of distributing and selling kerosene oil, gasoline and greases, and other petroleum products, etc.

On a former appeal, the cause was remanded for further findings of fact, more especially in reference to the existence of certain ordinances of the town of Sanford deemed relevant to the inquiry. *S. c.*, 178 N. C., 82.

Pursuant to that opinion, the court, on a further hearing, finds that the following ordinances of the town were passed, and are now in force on the subject, in terms as follows:

"Be it resolved by the board of aldermen of the town of Sanford, N. C.

"SECTION 1. That it shall be unlawful for any person to install, build, construct, or erect, alter or repair any tanks, buildings, or other structures in which gasoline, oil, kerosene, or any other highly inflammable substance is stored for distribution and sale, nearer than a thousand feet from any dwelling or in any residential section within the corporate limits of the town of Sanford, North Carolina: *Provided, however,* nothing in this ordinance shall apply to underground tanks built in the earth, or located inside mercantile establishment from which gasoline, oil and kerosene, or any other oils are sold or retailed. Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor, be fined fifty dollars ($50), and each day said structures remain or are used shall constitute a separate offense hereunder.

"SEC. 2. This ordinance shall be in force from and after its passage.

"Passed 15 July, 1919.

"Be it ordained by the board of aldermen of the town of Sanford, N. C.:

"SECTION 1. That it shall be unlawful for any person to store gasoline or other highly inflammable, combustible, or explosive oils or substances in tanks or other structures situate nearer than 1,000 feet from any dwelling, residence, or building used as such, within the corporate limits of the town of Sanford: *Provided, however,* that this ordinance shall not apply to underground tanks, or tanks inside of mercantile establishments in which gasoline, kerosene, or other oils are sold or retailed.

"SEC. 2. Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor, be fined $25: *Provided, however,* each day such structure or tank shall be used for storage purposes shall constitute a separate offense hereunder.

"SEC. 3. That this ordinance shall be in force and effect from and after 1 October, 1919."

And that the proposed structures to be used for the company's business will be within the distances as prescribed and prohibited by the ordinances, but there is nothing in the structures themselves or the plans and specifications therefor which violates any law or ordinances of the State or town of Sanford.

The court thereupon gave judgment that the writ issue, setting forth his conclusion and the reasons therefor as follows:

"Upon the foregoing facts the court is of the opinion that no discretion is vested in the defendant as building inspector of the town of Sanford, as to the issuance of the permit for the erection of said structures, but that the issuance of said permit is a ministerial act to be performed by the defendant in accordance with the provisions of sec. 2986 of the Revisal.

"The court is further of the opinion that the issuance of such permit will not authorize or empower the plaintiff or any other person to occupy or use the structures on the said lot in violation of law or in violation of any ordinance now in force or hereafter enacted by the board of aldermen of the town of Sanford.

"Thereupon, upon the motion of attorneys for the plaintiff, it is ordered, considered, and adjudged that the defendant issue or cause to be issued to the plaintiff a permit, permitting him to erect on the lot described in the application the structures therein specified."

Defendant excepted and appealed.

Sinclair & Dye and Hoyle & Hoyle for plaintiff.
Williams & Williams for defendant.

HOKE, J. From the admissions in the pleadings and findings of fact made by his Honor, it appears that plaintiff is a corporation engaged in distributing and selling kerosene oil, gasoline, and other petroleum products, and for the purpose and with the intent of carrying on its business within the corporate limits of the town of Sanford, on 14 June, 1919, applied to the building inspector for a permit to erect in said town, on the corner of the Southern Railway right of way and Weatherspoon Street, certain described surface structures, including "3 steel tanks on brick piers, 20 x 40 frame warehouse offices, pump house, etc., together

with all pumps, engines, pipe lines, fences, and equipment necessary for the conduct of the company's business." That, owing to the fact that the city government was at the time examining into the matter with a view of determining whether this was a proper business to be carried on within the corporate limits, etc., the application was not then given. Whereupon, on 3 July, 1919, plaintiff instituted this proceedings for a *mandamus* to compel performance of the alleged duty. Pending the suit, the board of aldermen, having in their judgment ascertained by inquiry of the State Insurance Commissioner, the officials of adjoining towns where such structures had been erected and used, and others, that the proposed business and buildings, etc., would be highly inconvenient and annoying to adjacent owners and citizens generally, and import menace to lives and property, passed the ordinances hereinbefore set out.

In reference to the ordinances, the court finds that the business and structures on the site as designated will come within the distances prescribed and prohibited by the ordinance but, finding also that there is nothing in the plans and specifications of the buildings themselves that are violative of the general State and municipal regulations as to buildings, and being of opinion, therefore, that there was a ministerial duty permitting no discretion on the part of the inspector, gave judgment that the writ issue, and defendant, the inspector, appealed.

It is undoubtedly true that performance of a mere ministerial duty on the part of a public official, when arbitrarily refused, may be enforced by *mandamus,* and, under some conditions, the issuance of a building permit, under our statutes appertaining to the subject, may come within the principle. *County Board of Education v. State Board,* 106 N. C., 81; *Hartman v. Collins,* 106 N. Y. Supr. Ct., 11. But it is also fully recognized that the writ of *mandamus* will not be issued to enforce the performance of an unlawful act nor one in furtherance of an unlawful purpose. *Betts v. Raleigh,* 142 N. C., 229; *Godwin v. Carolina Tel. Co.,* 136 N. C., 258; *Hall v. State,* 82 Ala., 563; *Chicot County v. Kruse,* 47 Ark., 80; *State ex re Ry. Co. v. Latrobe,* 81 Md., 223; *State ex re Matheny v. County Ct. Wyoming,* 47 W. Va., 672.

In *Godwin v. Tel. Co.* the application was to compel the installation of a telephone in a bawdy house, and it was held that the writ must not lie, and the present *Chief Justice,* delivering the opinion, said: "But while it is true that there can be no discrimination where the business is lawful, no one can be compelled or is justified to aid in unlawful undertakings." And in the annotations of this case appearing in 6 Anno. Cases, 203, the general principle is stated as follows: "It is well settled that *mandamus* will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid an

unlawful purpose," citing numerous authorities. These building regulations appearing chiefly in our statute on towns, Rev., ch. 73, sec. 2896 *et seq.*, are of general application, to be followed and allowed only when the business to be conducted therein is lawful, and are subject in this respect to the police powers conferred by this and other laws on municipal governments for the public good. *State of Mo. ex re Gas Co. v. Murphy,* 170 U. S., 78. In this instance, it appears that the avowed and only purpose of erecting these structures is to carry on the business of selling and distributing kerosene oil and gasoline and other petroleum products: a purpose not only evidenced by the character of the building, but so expressly stated in the complaint.

The subject is well within the governmental powers ordinarily possessed by this and other cities and towns. *Hudachick v. Los Angeles*, 239 U. S., 394; *Reinan v. Little Rock*, 237 U. S., 171, and the municipal authorities of Sanford, having formally passed ordinances by which the proposed business is made unlawful, under the principle of the decisions heretofore cited, we are of opinion that the application for *mandamus* should be denied. And such a defense is available though it may have arisen since the institution of the suit.

The act having become unlawful, the position may be made effective at any time pending the proceedings when it is properly brought to the attention of the Court. *Williams v. Hutton*, 164 N. C., 216; *Brinson v. Duplin Co.*, 173 N. C., 137; *Wikel v. Comrs.*, 120 N. C., 451; *Hall v. State,* 82 Ala., 563.

On the facts present, we are of opinion that the application must be denied, and it is so ordered.

Reversed.

B. R. JARMAN v. N. E. DAY.

(Filed 17 March, 1920.)

1. Wills—Devise—"Lend"—Estates.

The word "lend" applying to lands and used in a will, will be construed as "give" or "devise," unless it is manifest from the terms of the will, that the testator did not intend an estate therein to pass.

2. Same—Defeasible Fee—Contingency—Time of Happening.

An estate "loaned" to testator's daughter R. during her natural life and at her death "I lend all of the" designated land "to the lawful heirs of her body, and to the lawful begotten heirs of their bodies if any," standing alone, would convey the fee simple title, but with the further expression, "in case she should die leaving no lawful issue of her body then I give all the above described land to my son J., and his lawful

heirs," the estate is defeasible in the event of the death of R. "leaving no lawful issue of her body," the contingency being the death of the devisor, but that of R. without leaving "lawful issue of her body," etc.

APPEAL by plaintiff from *Daniels, J.*, at the Spring Term, 1920, at chambers, under a case agreed, from ONSLOW.

This is an action to recover the purchase price of a tract of land, the defendant having refused to accept the deed tendered by the plaintiff, and to pay the purchase money, according to his agreement, on the ground that the title of the plaintiff is not an absolute fee-simple estate.

The plaintiff derives title under the will of Gardner Shepard, the material parts of which are as follows:

"I lend to my daughter, Rachel Foy, all of the land, etc. (description omitted), during her natural life, and at her death I lend all the above mentioned land to the lawful begotten heirs of her body, and to the lawful begotten heirs of their bodies, if any, and in case my daughter, Rachel Foy, dies leaving no lawful issue of her body, then I give all of the above mentioned land to my son John Shepard, and his lawful heirs."

The plaintiff, Rachel Jarman, is the Rachel Foy mentioned in said will, and she has living children and grandchildren.

John Shepard died in 1896, leaving children and grandchildren, and he has never conveyed his interest in said land.

His Honor held that the plaintiff did not have an absolute estate in fee, but that it was defeasible on her dying leaving no issue, and plaintiff excepted.

Judgment in favor of the defendant, and plaintiff appealed.

E. M. Koonce for plaintiff.
Rodolph Duffy for defendant.

ALLEN, J. There is nothing in this will having a tendency to show that the testator did not use the word "land" in the sense of "give" or "devise," and "the general rule is that unless it is manifest that the testator did not intend an estate to pass, the word 'lend' will pass the property to which it applies in the same manner as if the word 'give' or 'devise' had been used." *Sessoms v. Sessoms*, 144 N. C., 124.

The testator has then devised the land in controversy to the plaintiff, Rachel Jarman, then Foy, for life, and to the heirs of her body, which standing alone would be a fee simple under the rule in *Shelley's case*, but with a limitation over to "John Shepard and his lawful heirs" in the event the plaintiff "dies leaving no lawful issue of her body," which clearly makes the estate defeasible. *Dawson v. Ennett*, 151 N. C., 543; *Smith v. Lumber Co.*, 155 N. C., 391; *Rees v. Williams*, 165 N. C., 203.

In the *Smith case* the devise was to six children in fee, with the limitation that "If any of my said children mentioned in this item of my said will should die without leaving lawful issue of his or her body surviving, or to be born within the period of gestation after his death, then it is my will and desire that the part therein given and devised to said child shall descend to and upon the survivors of my said children mentioned in this item of this my will, or upon the lawful heirs who may be surviving any of my said children mentioned in this item," and the Court said, in construing the will: "Under several recent decisions of the Court, the children, under the third item of the will, took an estate in fee simple, defeasible as to each on an uncertain event—in this case, 'a dying without leaving lawful issue of his or her body surviving, or to be born within the period of gestation after death.' *Perrett v. Byrd,* 152 N. C., 220; *Dawson v. Ennett,* 151 N. C., 543; *Harrell v. Hagan,* 147 N. C., 111; *Sessoms v. Sessoms,* 144 N. C., 121; *Whitfield v. Garris,* 134 N. C., 24; *Smith v. Brisson,* 90 N. C., 284. And we have held, also, in these and other cases, that when a devise is limited over on a contingency of this kind, unless a contrary intent clearly appears in the will, the event by which each interest is to be determined must be referred, not to the death of the devisor, but to that of the several holders respectively."

Many other authorities could be cited to the same effect, but it is not necessary to do so.

Affirmed.

J. S. WYNNE AND WIFE AND MRS. R. T. GRAY v. GREENLEAF-JOHNSON LUMBER COMPANY.

(Filed 17 March, 1920.)

Arbitration—Consideration Implied—Fair Dealings—Breach of Agreement—Notice—Revocation—Actions—Liquidated Damages.

The parties to an agreement to arbitrate impliedly agree not to attempt to unduly affect the award, and the breach of which by the one party justifies a revocation by the other. Where a party to such an agreement designedly gets a material witness for the opposing party so drunk that he may not be able to testify on the hearing before the arbitrators, the party for whom this witness was to testify may give prompt notice of his revocation of the agreement and bring his action to assert his original rights. *Semble,* the injured party, had he so chosen could have sustained his action to recover the amount of liquidated damages specified in the agreement to arbitrate.

APPEAL by defendant from *Guion, J.,* at November Term, 1919, of FRANKLIN.

This was an action for damages for cutting timber under contract size, and negligent burning of lands of plaintiffs, submitted to R. B. White, referee. No exceptions were taken to his findings of fact or conclusions of law with the single exception of his findings and conclusions as to the breach of the agreement to arbitrate by plaintiffs, and consequent damage to the defendant. The judgment of the referee was confirmed, and the defendant appealed.

Jones & Bailey and Ben T. Holden for plaintiffs.
Wm. H. and Thos. W. Ruffin and W. H. Yarborough for defendant.

CLARK, C. J. The only question presented is as to the right of the plaintiffs to revoke the contract of arbitration.

The referee found as facts upon the testimony, which being approved by the judge are conclusive, on appeal that: "On 3 October, 1916, the parties entered into written agreement to arbitrate, arbitrators were selected, and a hearing set at Vaughn. Witnesses from Wood came to Vaughn on defendant's train. As the train was leaving Wood, defendant's superintendent, Hayes, caused inquiry to be made for whiskey, giving as his reason that he wished to get one Denton a witness for plaintiffs and a passenger on the train, drunk so that he could not testify. Upon learning that another passenger had a pint of whiskey in his bag back at the station, he had the train stopped and backed half a mile to the station. The whiskey was procured. Most of it was given to Denton, who became drunk. Denton was a material witness for the plaintiffs."

The plaintiffs not long after gave notice of their revocation of the arbitration, and brought this action.

The defendant breached the contract of arbitration by this action of its superintendent, and we agree with the counsel for the plaintiffs that they might well have insisted upon the recovery of $500 liquidated damages on account thereof. They chose rather to proceed to assert their original rights in this action. Mr. R. B. White, the referee, we think stated the law tersely and correctly as follows, in his report, which the judge approved: "An agreement to submit a controversy to arbitration by necessary implication carries with it the condition that neither party will attempt by any unfair or fraudulent means to affect the award which is to be made. The condition is concurrent and vital. A breach of such condition by one party to the agreement justifies a revocation by the other. Intentionally getting a material witness drunk for the purpose of keeping him from testifying in behalf of the other party is such a breach, and your referee is of the opinion that the defendant should recover nothing on his counterclaim."

In 2 Ruling Case Law, p. 93, it is said: "It has been held that where a party takes a fraudulent advantage of the other party, the award will be set aside. *Chambers v. Crook,* 42 Ala., 171; *Emerson v. Udall,* 13 Vt., 477."

In 5 Corpus Juris, 61, it is said in summing up the authorities cited: "If the party revoking the submission has sufficient cause to do so, he, of course, incurs no liability for damages."

The conduct of the defendant's superintendent, for which the defendant company is responsible, was so clearly reprehensible and contrary to good faith and public policy that the action of the referee and of the court needs no citation of authorities in approval.

It may be proper to add, in the language of *Lord Erskine,* when at the bar, "Morality may come in the cold abstract from the pulpit, but men smart practically under its lessons when we lawyers are the teachers."

Affirmed.

J. N. HARRIS v. J. A. TURNER, J. M. ALLEN AND W. H. ALLEN.

(Filed 17 March, 1920.)

1. Trials—Evidence—Weight and Credibility—Questions for Jury—Damages.

The plaintiff sued defendants, tobacco warehouse proprietors, for balance alleged to be due him for salary, and at the same time defendants were suing the plaintiff for an amount alleged to be due for moneys paid out by them for tobacco on the plaintiff's individual account, and at his request, and upon the consolidation and trial of the two actions, the jury returned a verdict in defendant's favor, but in a less sum than demanded, from which defendants appealed, without any exception to the charge of the judge or tendering prayers for special instructions, upon the ground that if they were entitled to recover anything it should have been in the full amount of their claim. *Held,* the weight and credibility of the evidence was properly left to the jury, upon the issue joined, to determine thereon the amount due the defendants.

2. Appeal and Error—Objections and Exceptions—Prayers for Instruction—Assent.

An exception cannot be maintained that the judge left the amount of damages, sought in the action, to the determination of the jury, when there is no exception to his charge, or requests for special instructions thereon, it being for the defendant to enter his exceptions, either to the instructions given or to the failure to give special instructions thereon aptly tendered, and his failure to have done so is deemed as his assent to this treatment of the questions presented.

3. Courts—Evidence—Weight and Credibility—Verdicts Set Aside—Discretion—Appeal and Error.

The weight and credibility of competent and conflicting evidence is for the determination of the jury. It is within the discretion of the trial judge to set aside a verdict on the ground that it is against the weight of the evidence, and his action thereon is not reviewable. The jury in this case was not bound to find for the defendants, however strong and convincing their evidence may have been. If the verdict was contrary to the weight of the evidence the defendant's remedy was by motion to set aside the verdict as indicated above.

CIVIL ACTION, tried before *Guion, J.*, and a jury, at August Term, 1919, of FRANKLIN.

Plaintiff brought an action against defendant to recover $1,000, the balance of a salary of $2,000 alleged to be due him as drummer for the defendant, who had a tobacco warehouse in Louisburg. Defendant, J. A. Turner, sued plaintiff, in another action, to recover $3,114.77, which they allege he owed them on his "pin hook" account, that is, not on any business done for them, but on his own account, during the years 1915 and 1916 by purchasing leaf tobacco for himself and selling it in the defendant's warehouse, the latter advancing money to the amount of $24,158.49 to aid him in these personal transactions. Plaintiff paid on this amount in cash $20,043.72, which, together with the one thousand dollars of the salary due the plaintiff, left a balance of $3,114.77, which this suit was brought to recover.

The two actions were consolidated and tried together. The balance of salary being treated as plaintiff's claim, and the balance due of the "pin hook" account as defendant's counterclaim, plaintiff denying the latter, and averring that he owed nothing upon it, as it was not his account, but that of the defendant. There was evidence on the question, whether what is called the "pin hook" account was the personal account of the plaintiff, or the account of the defendant, based on transactions exclusively theirs. This question was submitted to the jury, and the following verdict was returned:

"Is the plaintiff indebted to J. A. Turner upon the counterclaim pleaded in this action; if so, in what amount? Answer: '$1,000.'"

The court charged the jury as follows: "Defendants, while admitting this unpaid account, contend that plaintiff is indebted to Turner and the warehouse company in the sum of $3,840.67, as limited by his complaint, over and above the sum so due him on salary account, and contends that this issue should be answered in his favor for tobacco bought on personal account of J. N. Harris. Therefore, you are relieved of considering the question of amount due plaintiff Harris. The question you are to consider is, Does plaintiff Harris owe defendant warehouse company this

money advanced on personal account of Harris in payment of tobacco purchased by him for his personal use and benefit? If defendants have satisfied you by the greater weight of the evidence that the tobacco was bought by Harris on his own account, inquire and say how much was paid out on such purchases by the company; and answer the issue in such amount as you may find was paid. If defendants have failed to so satisfy you by the greater weight of the evidence, or, on the other hand, if you shall find that the tobacco was bought by Harris for Turner and the warehouse company, and accepted by the company and paid for by it under such purchases, then answer the issue 'Nothing.'"

There was no prayer for instructions. Judgment on the verdict. Defendants appealed, and assigned this single error: "The defendants except to the refusal of the court to grant their motion to set aside the verdict upon the ground that the same is inconsistent with any or all of the evidence, for that if the defendants are entitled to recover anything upon their counterclaim, they are entitled to recover the full amount thereof, and in no view of the evidence could the jury have found consistently with any or all of the evidence that the defendants were entitled to recover the sum of $1,000 and no more, the plaintiff having not denied specifically the purchase by him of any particular lot of tobacco, but contending that all of the tobacco was bought for the warehouse, and none for his own account and risk."

Wm. H. and T. W. Ruffin and W. M. Person for plaintiff.
B. T. Holden, W. H. Yarborough, and White & Malone for defendant.

WALKER, J., after stating the facts as above: We do not see how there can be any error in the judge's charge, and none is alleged. The case was left with the jury upon the evidence as to the terms of the contract between the parties and as to the damages. The jurors were not bound to accept as true all the testimony offered by the plaintiff or the defendants, but could accept a part and reject the remainder, as they were the sole judges of the testimony, and what it tended to prove, which, of course, included the credibility of the witnesses. They might, for instance, have found that plaintiff had not promised to pay as much as the defendants claimed, or had not bought, for himself, as much leaf tobacco as alleged.

The objection of the defendants is not to the judge's charge, but to the verdict, which is the only object of his attack—not to what the judge said, but to what the jury found. The judge left the question of damages entirely to the jury, for he could not decide it as a matter of law. We cannot agree with the defendants' contention, in a legal sense, "That the verdict is inconsistent with any or all of the evidence," and if de-

fendants were entitled to recover $1,000, they were entitled, as a matter of law, to recover all of their claim. There was no request for an instruction to that effect, and there is no exception to the charge of a like nature. If the proposition be true, the point of the objection is not that the jurors decided contrary to the instruction of the court, for the court gave no such instruction, but it was that the jury failed to instruct themselves as to the law. When the judge left the amount paid by the defendants for the jury to find, defendants were silent, and, therefore, assented to this treatment of the question. If the defendants desired a special instruction, to guide the jury, they should have asked for it. *Simmons v. Davenport,* 140 N. C., 407. We there held that if a party desires fuller or more specific instructions than those given by the court in the general charge, he must ask for them and not wait until the verdict has gone against him, and then, for the first time, complain that an error was committed. We repeated this rule in *Davis v. Keen,* 142 N. C., at p. 502, in these words: "Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances and, after availing himself of the chance to win a verdict, raise an objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object," where the instruction of the court is not itself erroneous. This has been approved in many cases, and very lately in several. *Baggett v. Lanier,* 178 N. C., 132; *Futch v. R. R., ibid.,* 282; *Sears v. R. R., ibid.,* 285; *S. v. Stancill, ibid.,* 683. It can make no difference how strongly the evidence supports the defendant's view, it is still a question of fact to be settled by the jury. In such a case, the remedy is a request to the court that the verdict be set aside as being against the weight of the evidence, the decision upon which is in the discretion of the judge, and it is not reviewable. It would have been an invasion of the province of the jury if the judge had instructed them to answer a question of fact in a particular way. Revisal of 1905, sec. 535; *Withers v. Lane,* 144 N. C., 184; *S. v. Rogers,* 173 N. C., 755; *S. v. Windley,* 178 N. C., 670.

The plaintiff denied any liability to the defendants on the alleged "pin hook" account, or that he owed the amount claimed, raising thereby an issue for the jury.

No error.

IN RE WILL OF PERRY WIGGINS.

(Filed 17 March, 1920.)

1. Wills—Specific Legacies—General Legacies—Pecuniary Legacies—Interpretation—Intent.

As a rule, specific legacies do not abate with or contribute to general legacies, except when the whole estate is given in specific legacies, and there is a pecuniary legacy, or the intention of the testator appears from the will that the specific legacy shall abate.

2. Same—Codicils.

Among other things, a testator devised to his daughter L. a certain tract of land and to his daughter J., certain enumerated articles of personalty, etc., and by codicil, revoked the devise to L., and substituted a bequest of $900 therefor, confirmed the bequest to J., and added thereto a bequest of $100: *Held*, the bequest to J. of all the personal property the testator may possess at his death not named in his will, and all moneys, "if any after paying debts, etc.," were general legacies, and the designated moneys and enumerated personal properties were specified legacies, which would not abate with or contribute to the general legacies, and the residue of the fund was properly to be applied in payment of the pecuniary legacies; and there being general and specific legacies in the will, the latter do not abate in payment of the pecuniary legacies.

APPEAL by Lucy Little from *Guion, J.*, at May Term, 1919, of FRANKLIN.

Perry Wiggins devised in the second clause of his will to his daughter, Lucy Little, a certain tract of land, duly described, containing 50 acres. He appointed his daughter, Jennie Wiggins, his executrix, and in clause six of said will he provided that if there was not a sufficiency of money on hand to pay his debts and funeral expenses, she was authorized to sell such personal property as was necessary, and gave to his daughter, Jennie Wiggins, "All the monies, if any, after paying as directed above, to her and to her alone. I also give her all the debts owing to me at my death, also all other property of whatsoever kind, including household and kitchin furniture of every kind and description, cattle, stock, and farming implements, horses, mules, in fact every species of personal property that I may possess at my death, not named in this will." He had specifically devised a bed and furniture to a grandson, and his real estate to parties named.

By a codicil to said will he revoked the devise of the tract of land by clause 2 to his daughter, Lucy Little, above recited, and he "gives and devises to my daughter, Lucy Little, $900 to her only use to do as she pleased with. In addition to the lands and personal property given to my daughter, Jennie Wiggins, in items 1 and 6, I give and bequeath to my daughter, Jennie Wiggins, $100 to her only use forever.

The final account of the executrix as filed showed a balance for distribution under the codicil of $247.71. She applied nine-tenths thereof on the pecuniary legacy to Lucy Little, and held one-tenth as due herself under the codicil. She also retained all the household and kitchen furniture, cattle, stock, farming utensils, horses, mules, and 500 pounds of meat. By consent, the meat was valued at $150. The personal property mentioned in item 6 of the will was retained by Jennie Wiggins as specifically devised. The court adjudged that these articles were a specific legacy, and, as such, not liable to abatement in payment of the pecuniary legacies given in the codicil, and adjudged that $150, the value of the meat on hand at the death of the testator, being the only property not specifically devised, is subject to the payment of said pecuniary legacies, and adjudged that Lucy Little was entitled to nine-tenths of the "value of the meat and nine-tenths of the $247.71, balance for distribution after payment of the debts and funeral expenses," and held that the articles devised in said item 6 to Jennie Wiggins were not subject to abatement in payment of the pecuniary legacies in the codicil. To the judgment that said articles in item 6 were a specific legacy to Jennie Wiggins, and not liable to payment of the pecuniary legacies, Lucy Little excepted and appealed.

Wm. H. and Thos. W. Ruffin and Ben T. Holden for Jennie Wiggins.
G. M. Beam and N. Y. Gulley for Lucy Little.

CLARK, C. J. It is true that item 6 was a residuary clause, but the articles therein given specifically to Jennie Wiggins do not abate in favor of a pecuniary legacy. In *Young v. Young,* 56 N. C., 217, the Court held that a devise, almost in the exact terms of this, was a specific legacy, and therefore did not abate in payment of a pecuniary legacy. In *Heath v. McLaughlin,* 115 N. C., 402, the Court held that the bequest of two shares of capital stock in the Columbia Manufacturing Company was a specific legacy.

In *Robinson v. McIver,* 63 N. C., 645, a case almost exactly on all fours with this, the Court held: "General pecuniary legacies are not chargeable upon, or to be preferred to, specific devises of land, although the latter be found in a residuary clause, which also includes personalty." These cases merely recognize the well established rule that "specific legacies do not abate with, or contribute to, general legacies. There are exceptions as when the whole estate is given in specific legacies, and there is a pecuniary legacy, or when an intention that the specific legacies shall abate, appears in the will." *Heath v. McLaughlin, supra.* This last is not the case here, for the codicil expressly confirms the devise of the property given to Jennie Wiggins by items 1 and 6, and indicates

no intention to reduce it in favor, or subject it to the lien of the pecuniary legacy to Lucy Little.

In this case the last clause of item 6, which provides: "In fact every species of personal property I may possess at my death not named in my will," is a general legacy. The testator died leaving a considerable quantity of meat, to wit, 500 pounds. This meat is not bequeathed specifically, and was properly applied to the pecuniary legacies in the codicil.

The second sentence in item 6 of said will, "I give and bequeath to my daughter, Jennie Wiggins, all moneys, if any, after paying as above directed (debts and funeral expenses) to her and her alone," was another general legacy, and the residue of said fund was properly applied to the pecuniary legacies in the codicil.

There being general and specific legacies in the will, the latter do not abate in payment of the pecuniary legacies.

Affirmed.

UNION TRUST COMPANY v. D. F. McKINNE.

(Filed 17 March, 1920.)

Cities—Counterclaims—Second Action—Different Counties—Cause Pending—Pleas in Bar—Removal of Cause—Transfer of Causes—Different Causes—Torts—Contracts—Principal and Surety—Bills and Notes.

The surety on a note brought action against the payee thereof for his discharge from liability upon allegation of an extension of time, for a consideration, given by defendant to the makers, without his consent, payment, in full, by the maker, etc.; and, thereafter, the payee brought suit, in another county to recover upon a written contract whereby the surety agreed to pay the note, if the principal maker did not do so after judgment obtained thereon against him. *Held*, it was optional with the payee to set up the written agreement with the surety, as a counterclaim, in the first action, or to withhold it and bring an independent action thereon, and the pendency of the first action was not in bar of a recovery in the second, or justify the granting of a motion either to dismiss it or transfer it to the venue of the first action. *Allen v. Salley*, at this term, where both actions were founded upon the same tort, cited and distinguished.

CIVIL ACTION, commenced in the city court of the city of Raleigh, and carried by appeal to the Superior Court of WAKE and tried before *Guion, J.*, at November Term, 1919, upon these issues:

"1. Was the judgment obtained against J. B. Yarborough and J. A. Turner paid within ten days upon its rendition? Answer: 'No.'

"2. If not, in what amount is the defendant indebted to the plaintiff? Answer: '$413.80; interest from 1 March, 1915, on $400.'"

Appeal to Supreme Court by defendant.

Willis Smith for plaintiff.
Wm. H. and Thos. W. Ruffin for defendant.

BROWN, J. The only assignment of error relates to the denial of the motion to remove the cause to the county of Franklin or dismiss the same because of another action between the same parties pending in the Superior Court of Franklin County and commenced shortly prior to the present action. The motion was denied and the defendant excepted.

It appears in the complaint in this case that J. B. Yarborough, J. A. Turner, and D. F. McKinne executed two notes for $200 each to the Union Trust Company; that the defendant was surety; that the notes were not paid at maturity, and that suit was commenced and judgment obtained against Yarborough and Turner; that the defendant McKinne was not included in the suit and no judgment obtained against him at his request. Whereupon McKinne executed the following paper-writing:

"The Union Trust Company, of Raleigh, N. C., having agreed at my request to refrain from joining me as a party defendant in the suit about to be brought by said company against J. B. Yarborough and J. A. Turner on two notes, to which I am also a party, I hereby, in consideration of the Union Trust Company forbearing to sue me on said notes, guarantee the payment of the said notes in the event that the Union Trust Company secures a judgment against J. B. Yarborough and J. A. Turner, and said judgment is not paid within ten days from its rendition thereof."

It is to recover on this paper-writing that this action was brought.

Shortly prior to the commencement of this action McKinne commenced an action against the Union Trust Company in the county of Franklin, in which he asked that he be declared to be discharged by reason of his liability on said notes by endorsement thereon. He alleges that he is discharged from liability on the notes because the Union Trust Company received from J. A. Turner money for indulgence on said debt sufficient to have discharged the said debt and interest, and that he, McKinne, was informed by the makers of said note that the same had been paid in full. McKinne alleges also that he is discharged by reason of unwarranted extension of the time of payment of said notes without his consent. It is contended by the learned counsel for the defendant that the pendency of the action in Franklin bars a recovery in this action, relying upon our recent opinion in *Allen v. Salley, ante,* 147. In our opinion the

cases are not at all similar. In *Allen v. Salley* it was held that where the owner of an automobile which collided with an automobile truck brought action against the truck owners in one county, they cannot, while such action is pending, bring a separate and distinct action in another county against the owner of the automobile for damages accruing to the truck owner by reason of the same collision.

There the transaction grew out of one tort, and the question was who was guilty of the negligence that caused it.

In the action in Franklin County the Union Trust Company could answer if they saw fit, and deny the allegations of the complaint, but they were not obliged to set up as a counterclaim McKinne's guarantee sued on in this action. It is well settled that the defendant is not obliged to set up his counterclaim, but he may omit it, and if he chooses to do so thereafter, he may bring another and independent action. He has his election. The Union Trust Company had the right to file an answer to the complaint filed in the Superior Court of Franklin County denying the allegations of the complaint, if in its opinion it stated a cause of action. At the same time it had the right to withhold setting up its cause of action against McKinne.

This question is fully discussed by *Bynum, J.*, in *Francis v. Edwards*, 76 N. C., 275. We think a distinction between the present case and *Allen v. Salley* is apparent upon reading the opinion in that case.

No error.

NORTH CAROLINA PUBLIC SERVICE COMPANY AND SALISBURY AND SPENCER RAILWAY COMPANY v. THE SOUTHERN POWER COMPANY.

(Filed 17 March, 1920.)

1. Corporations—Public Service—Competitors.

Ordinarily a public service corporation cannot be required to supply its competitor, a public service corporation, with the material necessary to enable the latter to discharge its duty to the public.

2. Same—Monopolies—Electricity—Hydroelectric Power—Charter Rights—Election—Courts.

Where the manufacturer of hydro-electric power having a monopoly of the water power over a considerable area in a populous portion of this state, has elected to supply, and has supplied an electric current, under one of its charter powers, to other public service corporations, for distribution or resale to the private users within a limited territory wherein the manufacturer does not, itself, distribute or resell, the corporations thus purchasing the current are not competitors of the manufacturer, but are a part of the general public, and the manufacturer

having elected to supply other public service corporations for the purpose of resale, may be forced to do so in our courts without discrimination for like service.

3. Same—Consumers—Rates—Corporation Commission.

The users of electricity in a city or town have a direct and vital interest in the wrongful refusal of a hydro-electric public service corporation from whom they may alone receive their supply, and where the retail corporation is claimed to be charging excessive rates, the matter is within the jurisdiction of the North Carolina Corporation Commission, when brought before it.

4. Same—Final Judgment.

Should it be established by final judgment of court that a public service corporation having a monopoly of manufacturing hydro-electric power had wrongfully refused to supply its electrical current to distributing or resale public service corporations, *semble* the Corporation Commission would have the authority to fix the rate of charges, under the requirements of the Court that the manufacturing company must furnish it.

WALKER and ALLEN, JJ., dissenting.

PETITION to rehear.

Linn & Linn, Robeson & Dalton, and Brooks, Sapp & Kelly for plaintiff.

Cansler & Cansler and W. S. O'B. Robinson, Jr., for defendant.

BROWN, J. This cause comes before the Court again on petition to rehear granted by myself in order that I might have opportunity to make a more thorough examination of the questions presented on the record than I had last session.

Such examination has confirmed me in my former conclusion. The questions presented have been so fully and ably discussed by the *Chief Justice* and *Justice Allen, pro* and *con,* that I will not undertake to add anything to the discussion. I will state my views briefly, but a little more fully than before.

The defendant filed an answer to the complaint, and afterwards, upon the hearing before Judge Shaw, moved to dismiss the action upon the ground that the complaint does not state a cause of action. The learned judge overruled this motion, and in so doing I am still of opinion that he committed no error.

Assuming that all the facts stated in the complaint are true, in my judgment, they make out a cause of action against the defendant which entitled plaintiffs to relief. These facts are well and correctly summarized in the opinion of the *Chief Justice* and need not be repeated. According to the allegations stated in the complaint, the defendant is a public-service corporation, engaged in business under the laws of this

State in manufacturing electricity by water power and selling it over a large territory by wholesale. It has a monopoly of the hydroelectric power supply in a considerable portion of a populous section of this State.

I candidly admit that as a general proposition, one public-service corporation cannot be made to supply a competitor, another public-service corporation of like character, with the material necessary to enable the latter to discharge its duty to the public.

But the facts alleged in the complaint, if established upon the final hearing, take this case out of that general rule.

Neither the North Carolina Public Service Company nor the railway company are competitors with the defendant, according to my interpretation of the facts stated in the complaint. The railway company is in no sense a competitor with defendant, as it is not in the business of manufacturing electricity for sale, but uses the current it buys from the defendant solely to operate its street car service between Salisbury and Spencer. Not being a dealer in, or manufacturer of electricity, in my opinion it cannot be considered a competitor in any sense, but so far as the defendant is concerned, is a part of the general public which defendant has elected to serve, and has the right to compel defendant to furnish it with electricity as far as defendant is able to do so.

I fail to find any reason or authority to support the position that a corporation manufacturing electricity for wholesale to the public cannot be made to supply a street car company if it is able to do so. A corporation under certain circumstances may be as much a part of the general consuming public as an individual.

According to the facts alleged, I do not think the other plaintiff, the North Carolina Public Service Corporation, is a competitor with defendant.

The plaintiff is a retailer of electricity and engaged in supplying the citizens of Salisbury and Spencer with electricity to light their residences and for other private purposes. It cannot compete with defendant, for the latter does not undertake to supply residences, and is in every sense a wholesaler of the electric current. The plaintiff supplies no territory supplied by defendant, but buys its current from the latter and distributes it among the inhabitants of a limited territory. While this plaintiff has power under its charter to manufacture, at instance of defendant it ceased to do so ten years ago, and the defendant has supplied the current by contract ever since. It has for all these years elected to treat plaintiff and other similar corporations as a part of the general consuming public, and to furnish them with electricity as a means of supplying the citizens of the territory that the defendant occupies.

Defendant is willing to continue doing so, provided these retail companies will pay the price demanded.

In my opinion the defendant had the right originally to confine its sales and contracts to those desiring electricity for direct personal consumption, and thereby retain control of the number of its customers, limiting them to that number it could adequately serve. But when defendant voluntarily entered the field of supplying current to a person or corporation which does not desire it for consumption, but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation desiring current from it for distribution purposes *prima facie* has precisely the same right to obtain it as another. A public-service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons.

If the defendant in the beginning had elected to supply only the individual consumer, I am satisfied it could not have been compelled to supply smaller corporations engaged in retailing the electric current. But when defendant commenced and continued to sell its current to such smaller corporations for purposes of resale and distribution, every such corporation has an equal right, and it must not discriminate. That does not mean it must sell them all at the same price. The circumstances surrounding each distributing corporation, cost, etc., must be taken into consideration.

Having undertaken this public service, the defendant is bound to serve impartially all who have the right to demand its service. As it does not undertake to furnish the individual consumer, and having elected to furnish corporations that do supply the individual, it must continue to furnish such corporations so far as its business and the capacity of its plants will permit.

This is the principle recognized by this Court in *Tel. Co. v. Tel. Co.*, 159 N. C., 15, wherein, quoting from the Indiana Supreme Court, it is said: "Such physical connection cannot be required as of right, but if such connection is voluntarily made by contract, as is here alleged to be the case, so that the public acquires an interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded." The citizens of Salisbury, Spencer, and adjacent territory have a very vital interest in this controversy.

The defendant does not undertake to furnish them electricity except through the medium of a distributing company. If defendant cannot

be compelled to so continue to furnish it, then these citizens have no other resource except to pay the higher cost of coal-made current, and the defendant is practically free from State control. Therefore, they have a direct public interest in imposing upon defendant the duty it voluntarily assumed ten years ago, and has been discharging ever since. Something has been said in the argument about the plaintiff charging these citizens 800 per cent profit. Nothing of that sort appears in the complaint. They have their remedy before the Corporation Commission, and if they are foolish enough to submit to such plunder it is their own folly.

These views, I think, are supported by the authorities cited in the opinion of the *Chief Justice,* as well as by the following cases: *Trans. Co. v. R. R. Com.,* 176 Cal., 499; *Morganton v. Hope Gas Co.,* March, 1919; Public Utilities Report Ann., 1919, D 270; *N. Y. v. McCall,* 245 U. S., 345; *Attica Water & Gas Co. v. National Gas Co.,* 3 P. S. C. (2 Dist. N. Y.), 207—almost on all fours; *Missouri v. Bell Tel. Co.,* 23 Fed. Rep., 540, opinion by *Justice Brewer; Acker M. & Co. v. N. Y. Edison Co.,* Pub. Utilities Re. Ann., 1919, B. 287. This latter case is very much in point. *Percival v. Public Service Commr.,* 148 N. Y. Supp., 583; *State v. Tel. & Tel. Co.,* 147 Pac., 885.

It is earnestly contended by the learned counsel for defendant that the Superior Court has no jurisdiction of this action because before any judgment can be rendered herein requiring the defendant to sell power to the plaintiffs, the Court would necessarily have to fix the rates and the terms and conditions of the sale, and it has no jurisdiction to do either, the Legislature having given the Corporation Commission full and exclusive jurisdiction over this subject.

If, upon the final hearing, when all the issues are passed upon and the true facts found, it shall be decided that the plaintiffs are entitled to a decree compelling defendant to furnish the current required, in case the parties cannot agree upon the price, I see no reason why the matter cannot be brought before the Corporation Commission and the defendant required by the Court to furnish the current at the rate fixed by the commission.

PER CURIAM.

The petition to rehear is dismissed.

WALKER and ALLEN, JJ., dissenting without further opinion than the one filed.

BUCKHORN LAND AND TIMBER COMPANY v. J. A. YARBROUGH.

(Filed 24 March, 1920.)

1. **Deeds and Conveyances—Description—Identification of Lands—Parol Evidence—Statutes.**

   A description of land in a deed, all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Revisal, secs. 948 and 1605.

2. **Boundaries— Evidence— Hearsay— Declarations—Deceased Persons—Surveyors—Interest.**

   Under the rule admitting declarations of deceased persons as evidence of boundaries, the person making them must have been disinterested at the time, they must have been made *ante litem motam*, and by a person since deceased; and a paper writing or memoranda made by a surveyor, since deceased, as to boundaries pointed out by a deceased owner in favor of his own title, are doubly incompetent, as hearsay, and as coming from an interested person, and their admission is reversible error.

3. **Landlord and Tenant—Possession—Adverse Title—Surrendering Possession—Assigning Tenant—Estoppel.**

   One who has entered into possession of lands as lessee of and under the title of another, and who retains the possession thus acquired, cannot resist an action by the lessor for its recovery brought after the termination of the lease, by showing a superior title in another, or in himself, acquired either before or after the contract of lease, and this element of estoppel applies to any one to whom the tenant has assigned, and who has entered into possession under him.

CIVIL ACTION, tried before *Connor, J.*, and a jury, at July Term, 1919, of CHATHAM.

This action was brought to recover the possession of land. The plaintiff, in its complaint, alleged title in itself to a large tract of land, which the plaintiff estimated to contain something like 10,000 acres. The defendant disclaimed any interest in the land except two tracts, one containing 110 acres, and one 7½ acres, in which he asserts ownership in himself, and denied the plaintiff's title. Upon coming to trial the plaintiff, with leave of the court, amended its complaint, limiting the controversy to the two tracts of 110 acres and 7½ acres, to which the defendant had asserted claim of title, and upon the amended pleadings as set forth in the record the case was tried. The defendant assigned three errors (among others not deemed necessary to be now considered), as follows: The admission, over his objection, of a deed from Neill McKay and John W. McKay to the Deep River Manufacturing Company, and other

deeds connecting him therewith, the ground of objection being that the description of the land in the deeds was too vague and uncertain for it to be identified. It will be necessary to give only the description in the first named deed, as the others refer to it, which is as follows:

"All that tract of land situated, lying, and being in the counties of Harnett and Moore, lying on both sides old road between Summerville and Neill McNeill's land in Moore County, bounded by the lands of Neill McNeill, Esq., lands belonging to the estate of Murdock McLeod, deceased, Jas. S. Harrington, Neil McLean, Jr., the Bethea lands, Jas. M. Turner, and the lands of the estate of Noah Buchanan and others, including a part of a five thousand-acre survey and a three thousand-acre survey patented by John Gray Blount and conveyed by Wm. B. Rodman and others to Neill McKay and John W. McKay, also six hundred and forty acres patented by the said John W. McKay, also a piece patented by Jas. S. Harrington and John Harrington and Neill McNeill and Hector McNeill and others, and by them conveyed to the said Neill McKay and John W. McKay, containing by estimation ten thousand acres." The second error assigned is the admission in evidence of a written lease of the lands for the purpose of working the trees thereon for turpentine, and for this purpose only, introduced for the purpose of estopping the defendant, who claimed under said lease, to deny the plaintiff's title. The third error assigned is to the admission of a paper-writing, signed by D. G. McDuffie, civil engineer, dated 24 September, 1888, for the purpose of locating the lands described in the McKay deed aforesaid, the said paper-writing being in the following words and figures:

"This is to certify that 14 November, 1868, Rev. Neill McKay and Dr. J. W. McKay and wife sold to the Deep River Manufacturing Company 10,000 acres of land in Harnett County and Moore County as follows: 5,000 acres and 3,000 acres known as the Blount Speculation land, and 2,000 acres composed of 640 acres granted to Dr. J. W. McKay and the pieces which the McKays had bought from Neill McNeill, Hector McNeill, Jas. S. Harrington, and John Harrington, joining Neill McNeill, McLeod, Neill McLean, Jr., Bethea, J. M. Turner, and Noah Buchanan.

"I further certify that I was selected by both parties to make an actual survey of said lands, and that the Rev. Neill McKay went with me and showed me where the boundaries were, and that after making the survey I handed the plat and courses and distances to Col. J. M. Heck, and I certify that the following are the courses and distances (then follows description by metes and bounds)."

There are other exceptions and assignments of error, but, in the view taken of the case by the court they need not be set out here.

Defendant moved for a nonsuit, which was denied, and he excepted. The jury returned the following verdict.

"1. Was E. J. Yarbrough, at the time she executed the deed to J. A. Yarbrough for the 110-acre tract described in the amended complaint, the tenant of the plaintiff's predecessor in title? Answer: 'Yes.'

"2. Is the plaintiff the owner and entitled to the possession of the lands described in the amended complaint? Answer: 'Yes.'

"3. What is the annual rental value of plaintiff's lands in the possession of the defendant? Answer: '$80.'"

Judgment on the verdict, and defendant appealed.

Seawell & Milliken and Hoyle & Hoyle for plaintiff.

Baggett & Baggett, H. E. Norris, A. C. Ray, W. P. Horton, and Chas. Ross for defendant.

WALKER, J., after stating the case as above: The description in the deed of Neill McKay and John W. McKay to the Deep River Manufacturing Company is sufficiently certain to let in parol evidence for the purpose of identifying the land. Since the decision of this Court in *Patton v. Sluder,* 167 N. C., 500, there can be no doubt of the correctness of the proposition just stated, that the description of the land is not too vague to be aided by parol proof so as to fit it to the land intended to be conveyed. The descriptive words in the *Patton case* were: "On the headwaters of Swannanoa River, adjoining Hemphill and Gilliam heirs and others." Prior to the decisions in *Blow v. Vaughn,* 105 N. C., 198, and *Wilson v. Johnson, ibid.,* 211, such descriptions as that appearing in the McKay deed were held not to be too vague and indefinite to be aided by parol proof. Those two cases varied the rule somewhat, but were disapproved in *Perry v. Scott,* 109 N. C., 374. The following was the description construed in the last case: "Lying and being in the county of Jones and bounded as follows, to wit: On the south side of Trent River, adjoining the lands of Colgrove, McDaniel, and others, containing three hundred and sixty acres, more or less." This was held to be sufficiently certain to be located by parol proof.

It is true we have held that a deed conveying real estate or a contract concerning it, within the meaning of the statute of frauds, must contain a description of the land, the subject-matter of the contract, "either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers." *Massey v. Belisle,* 24 N. C., 170. But the principle is satisfied by the descriptive words of this deed. The evidence proposed to be offered to identify the land must of course have that tendency, but we are not discussing the question

whether the description is sufficient in any given case, but the general one what description is, in itself, sufficiently certain to be perfected by parol testimony.

In our case we think the description is sufficient to let in parol evidence. The Revisal of 1905, secs. 948 and 1605, declares in explicit language that this shall be the law. The matter is so fully discussed in *Perry v. Scott, supra,* and in *Patton v. Sluder,* 167 N. C., 500, that further comment would be useless. While we hold that the deed is valid, there was some evidence admitted to identify the land, which we deem to be incompetent. We refer to the notes of the surveyor, D. G. McDuffie, made in September, 1888, and which are fully set forth in our statement of the case. The paper is in the handwriting of McDuffie, who is dead, and it was written by him before this controversy arose, and this action was brought, and, at the time of writing these notes, McDuffie had no interest in the land, or the subject-matter of the notes, except that he had been employed by the McKays and the Deep River Manufacturing Company to make the survey for them, but the fact remains that the surveyor McDuffie derived his knowledge of the lines and corners, upon which he based his survey, from Parson Neill McKay, and this fact appears in the notes offered in evidence by the plaintiff, for he says in the notes: "I further certify that I was selected by both parties to make an actual survey of said lands, and that the Rev. Neill McKay went with me and showed me where the boundaries were, and that after making the survey I handed the plat and courses and distances to Col. J. M. Heck, and I certify that the following are the courses and distances." It is true that in questions of boundary, hearsay is competent as evidence. But it must come from a disinterested source. The conditions under which it is received are: (1) the declaration must come from a disinterested person; (2) it must have been made *ante litem motam;* and (3) the person who made it must be deceased, so that he cannot be produced and heard in person as a witness. *Smith v. Headrick,* 93 N. C., 210; *Yow v. Hamilton,* 136 N. C., 357, and cases cited. It was said by *Smith, C. J.,* in *Whitehurst v. Pettipher,* 87 N. C., 179: "The declaration is received under the conditions mentioned as evidence, instead of the sworn statement for which it is substituted, when the party making it is dead and the evidence would otherwise be lost. It is manifest that if the declarant were alive, and would be allowed to prove the fact to which the declaration relates, the declaration itself may be proved after his death." In this case, if McDuffie were living, he would not be permitted, as a witness, to testify as to what Dr. McKay told him about the boundaries, because it would, of course, be hearsay, and Dr. McKay was at the time he showed him the boundaries of the land an interested person, being the owner of the land, or one of its owners. The primary

declaration would not have come from a disinterested source. The notes of McDuffie were written twenty years after the actual survey was made by him, and were based, it appears, entirely upon the declaration of an interested person. They constituted the declaration, not the sworn testimony, of McDuffie, as to what another man had declared, and the latter interested in the land, the boundaries of which are in question. It is the declaration of the person who knows the boundaries that is required to satisfy the rule of admission, and that is, in this case, the declaration of Dr. McKay. It is excluded because of his interest in the land, and his making a declaration favorable to himself. The declarant must be dead, because if alive he must be produced as a witness, and he must be disinterested, and the declaration must be made *ante litem motam* to avoid bias or to free it from suspicion, and to remove all temptation to falsify. *Dobson v. Finley,* 53 N. C., 495; *Shaffer v. Gaynor,* 117 N. C., 15; *Westfelt v. Adams,* 131 N. C., 379. It is admitted from necessity, because it is the best and only evidence of the fact obtainable. Mr. McDuffie was only writing into his notes substantially something that Parson McKay had told him, which is hearsay upon hearsay. The cases we have generally had are those where a living witness testified to what a deceased person had declared as to boundaries. The judge erred in admitting these notes. They were material, and their admission prejudicial, because they were used for the purpose of locating the boundaries, and were allowed, by the court, to have the effect of proof as to them, and, if competent, they would be strong proof of the lines and corners.

The third question, as to the estoppel of the defendant to deny the plaintiff's title, because of the tenancy of his predecessor, E. G. Yarborough, requires little discussion as to the facts. They must be settled by the jury. We need only to state the general principles of law governing such cases, and the applicability of the estoppel to a subtenant. It is well settled doctrine, says the Court, in *Davis v. Davis,* 83 N. C., 71, that one who, as tenant, gains possession of the land of another cannot resist an action for its recovery, brought after the termination of the lease, by showing a superior title in another or in himself, acquired before or after the contract. The obligation to surrender becomes absolute and indispensable. Honesty forbids, says *Ruffin, C. J.,* that he should obtain possession with that view, or, after getting it, thus use it. *Smart v. Smith,* 13 N. C., 258. Neither the tenant nor any one claiming under him, remarks *Daniel, J.,* can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. *Callendar v. Sherman,* 27 N. C., 711. If he entered as tenant, or, after entry, had become such, is the language of *Rodman, J.,* he was estopped from asserting his title until he had restored the possession to the plaintiff. *Heyer v. Beatty,* 76 N. C., 28.

Even a homestead right cannot be asserted in opposition to the recovery. *Abbott v. Cromartie,* 72 N. C., 292. The rule does not preclude the tenant from showing an equitable title in himself or such circumstances as under our former system would call for the interposition of a court of equity for his relief, and which relief may not be obtained in the action, as is held in *Turner v. Lowe,* 66 N. C., 413. Yet the force of the general proposition remains unimpaired, that where the simple relation of lessor and lessee exists without other complications, the latter cannot contest the title of the former. *Forsythe v. Bullock,* 74 N. C., 135. The obligation to restore a possession thus obtained, before an inquiry into the title is permitted, although springing from the contract, rests upon the foundation of good faith and honest dealings among men. *Lawrence v. Eller,* 169 N. C., 211; *LeRoy v. Steamboat Co.,* 165 N. C., 109. This principle of estoppel is fully considered, in these two cases, and in *Lawrence v. Eller, supra,* this Court said that the general rule, however, as stated, while it varies at times in its application, has been everywhere recognized as sound, and has always been very rigidly enforced in this jurisdiction, citing in support of it the following authorities: *Campbell v. Everhardt,* 139 N. C., 502-514; *Pool v. Lamb,* 128 N. C., 1; *Springs v. Schenck,* 99 N. C., 552; *Davis v. Davis,* 83 N. C., 71; *Farmer v. Pickens,* 83 N. C., 550; *Wilson v. James,* 79 N. C., 349; *Abbott & Foster v. Cromartie,* 72 N. C., 292; *Callender v. Sherman,* 27 N. C., 711; *Town v. Butterfield,* 97 Mass., 105; *Brown v. Keller,* 32 Ill., 157; *Davis v. Williams,* 130 Ala., 530; *Rodgers v. Boynton,* 57 Ala., 501; *Ward v. Ryan,* J. R., vol. 10, 76-77, p. 17; *Peyton v. Stith,* 5 Peters, 485; 2 McAdam Landlord and Tenant, sec. 421; 18 A. and E. (2 ed.), p. 414; 24 Cyc., 946.

The Court held in *Springs v. Schenck, supra:* "A tenant cannot be heard to deny the title of his landlord, nor can he rid himself of this relation without a complete surrender of the possession of the land." It was held in *Towne's case, supra:* "A tenant at will is estopped from denying his landlord's title without surrendering of the leased premises or eviction by title paramount or its equivalent." The Court said in *Brown v. Keller:* "That a tenant must surrender the premises before asserting rights adverse to his landlord, which he acquired after renting the premises." And in *Davis v. Williams, supra,* it was held as follows:

"1. A tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy (p. 58).

"2. It is only where there is a change in the condition of the landlord's title for the worse, after a tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title (p. 58).

"3. A tenant must first surrender the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter (p. 58).

"4. An estoppel will be enforced in a court of equity as well as in a court of law (p. 59)."

We see from this review of the subject, and the long line of cases sustaining our conception of the law, that there can no longer be any dispute as to the nature of this kind of estoppel, or as to its effect. It may also be considered as settled that any one to whom the tenant has assigned, and who has entered under him, becomes subject to the estoppel as much so as the tenant himself, and the authorities already cited are equally clear and explicit as to this proposition. Whether the case is brought under the influence of this principle depends, of course, upon the facts as found from the evidence. We will not refer to the facts, or comment upon them, as we cannot well anticipate what they will be at the next trial, when ascertained by the jury. The question of adverse possession is also postponed until the other matters are decided, as it depends upon them.

We order a new trial because of the error in regard to the notes of the surveyor, and we exercise our discretion by extending it to both tracts of land.

New trial.

THE MERCHANTS NATIONAL BANK OF RALEIGH v. WILLIAM J. ANDREWS.

(Filed 24 March, 1920.)

1. Bills and Notes—Want of Consideration—Presumptions—Burden of Proof—Statutes.

Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee, as a defense, in an action thereon, the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payer to a judgment in his favor; and the maker's mere conclusion as to the fact constituting his defense is insufficient, when his testimony is itself insufficient to establish it. Revisal, sec. 2772.

2. Same—Evidence—Banks and Banking—Verdict Directing—Trials—Instructions.

The defendant was an endorser on a note given to a bank, of a corporation of which he was president, his corporation doing its business at the payee bank, and defendant at another bank, and relied as a defense in an action by the payee thereof to recover thereon, the want of consideration therefor. His evidence, and the only evidence in the case, tended to show, that he had given the payee bank two checks on his own

bank for two amounts, at the request of the officer of the payee bank, one of which was for interest to discount an extension on his own personal paper, and the other, interest for like purpose, on the paper of his corporation, and that the payee bank did not pay him "on that day" the money on the note, or any one else at his request. *Held*, insufficient to rebut the presumption raised by his endorsement on the note, that he received value therefor, and the court was not in error in directing verdict on the evidence should the jury find the facts accordingly.

APPEAL by defendant from *Daniels, J.*, at February Term, 1920, of WAKE.

This is an action on two notes, one for $1,500, and the other for $12,000, dated 8 April, 1919, due ninety days after date with interest after maturity.

The defendant admitted the execution of the notes, and alleged that they were without consideration.

The plaintiff introduced evidence tending to prove the execution of the notes by the defendant, and also the following part of paragraph three of the answer:

"The defendant admits, in answer to paragraph three, that he executed a note for the amount, and of the tenor of the copy set forth in paragraph three of the complaint."

The defendant introduced the examination of himself taken by the plaintiff before the clerk, as follows:

"His name is William Johnston Andrews, age 48 years, residence, 105 E. North Street, Raleigh, N. C. Plaintiff's attorney handed witness a paper, which was identified and marked 'Plaintiff's Exhibit A.' The defendant stated that he signed the said paper, it being the note for $12,000. Plaintiff's attorney handed witness another paper marked 'Plaintiff's Exhibit B,' which was a note for $1,500, and witness stated that he signed the same. Witness states that Exhibit A calls for an amount of $19.30. Witness stated that he signed the same. Plaintiff offers Exhibit A and Exhibit B, both being dated 8 April, 1919. Defendant was asked if he drew a check on the Citizens National Bank of Raleigh on 8 April, 1919, payable to the order of the plaintiff or its cashier for the payment of interest on said 'Exhibit A' and 'Exhibit B,' aggregating $227.20. Defendant stated that he did not draw a check for $227.20; that he drew two checks on 8 April, 1919, payable to the Merchants National Bank, check No. 2003 for $30.40, and check No. 2004 for $205.20. These checks were given for the payment of some papers that he had, some of his papers and some of Monitor Graphite Company's papers; that he could not say that the check for $205.20 was given for the interest on the two notes for the reason that Mr. Drake said that he needed so much and the witness drew the check for that amount.

They were working together, and he said draw a check for so much, and defendant drew it. He does not deny that he paid the discount upon the two notes. He thinks the check for $30.40 was given to cover his own personal papers; that he did not think that he had any papers in the Merchants National Bank, but he had others that were handled through the Merchants Bank; that he had some at Apex that were handled through the bank; that some other transaction must have taken place between the witness and the Merchants Bank on 8 April, 1919, other than relating to the falling due of the two notes above referred to, as will be seen by check for $30.40 of that date. Witness was educated at Chapel Hill and Cornell, and took a degree of Mechanical Engineering at Cornell. When he signed the two notes offered in the evidence he saw that each one of them was due in 90 days, and that the interest was due after maturity. He has had considerable experience with banks, has given notes, paid notes, drawn notes and checks on banks. His own individual business is done with the Citizens National Bank of Raleigh. He could not ascertain from examining his checks and accounts what those two checks covered, as the only recollection he has of it was going in there and Mr. Drake said he wanted some money to cover interest on the two papers, and he supposed that was what it was for. He gave Mr. Drake the two checks, as Mr. Drake said that to witness, witness means simply to say that he did not make any calculation himself. States that he does not know that Mr. Drake said it was for interest on the two notes.

"Q. You just said it was for interest on these papers? A. I think that is right in interest and stamps.

"Q. The interest on $13,500 for 90 days is $202.50? Witness calculates and answers 'Yes'; and adds that interest and stamps on $13,500 for 90 days. He had other notes out, but he could not tell you what the amounts were on 8 April, 1919. No other notes for that exact amount at said bank at that time, nor called to witness's attention since.

"The Merchants National Bank did not pass to his credit, so far as he has heard, on 8 April, 1919, the sum of $12,400. He did not get from the bank on that day $13,500. He did not pay the sum of $19.30 on 5-20-19 on the $12,000 note. He did not authorize it to be paid. Mr. Drake was handling the finances of the company, and if it was paid it was undoubtedly paid by him out of some money that he had. The bank did not notify him how it acquired the $19.30, and he does not know of his own knowledge. Mr. Drake filled up the $12,000 note, and the $1,500 note. The Merchants National Bank did not pay to anybody at his request on 9 April, 1919, $13,500.

"He was at one time president of the Raleigh Electric Company, county chairman of one of the great political parties. He was president

of the Monitor Graphite Company of which Mr. Drake was vice president. When he was president of the Raleigh Electric Company there were about 30 men under him.

"Was 3 years at Cornell, and my degree from that college ranks with the best in the country. It takes 4 years to get it usually."

The defendant, after objection by plaintiff, offered the following part of paragraph two not offered by the plaintiff: "But that the said note was executed by him without any consideration whatever, and, except as herein admitted, the allegations of paragraph two are untrue and are denied."

At the conclusion of the evidence his Honor instructed the jury to answer the issues in favor of the plaintiff if they believed the entire evidence, and the defendant excepted.

There was a verdict and judgment for the plaintiff for the amount of the notes sued on, and the defendant appealed.

Robert W. Winston for plaintiff.
Manning, Kitchin & Mebane for defendant.

ALLEN, J. The introduction of a part of the answer of the defendant by the plaintiff, which made it possible for the defendant to introduce the remainder of the paragraph, and which raises the only question debatable on the appeal, was unnecessary because the defendant having admitted the execution of the notes and having pleaded as a defense the want of consideration, the burden was on him to make good the defense, and if he had declined to introduce evidence the plaintiff would have been entitled to judgment on the pleadings.

This is not, however, fatal to the plaintiff, as the statement in the answer that the notes were executed without consideration, when considered in connection with the examination of the defendant, is but a mere conclusion.

The defendant states no facts in the answer showing why he alleged that there was no consideration for the notes, and when he was examined, instead of swearing that they were without consideration, he states the facts connected with the transaction, and upon which he relied to show want of consideration, and these are not sufficient in our opinion to meet the burden cast upon him by the law upon the admission of the execution of the notes. See *Piner v. Brittain*, 165 N. C., 401, and Rev., 2172.

He says, upon his examination, "the Merchants National Bank did not pass to his credit so far as he has heard on 8 April, 1919, the sum $13,500." Certainly not, because the defendant kept his account with the Citizens National Bank and not with the Merchants National Bank.

He says again, he "did not get from the bank on that day $13,500," and again, "the Merchants National Bank did not pay to anybody at his request on 9 April, 1919, $13,500."

These statements may all be true, and still they do not prove the defense.

In the first place, the defendant confines his statement to one particular day, and to the payment of the whole amount on that day, when the money might have been paid on another day or in different amounts on different days, or the notes sued on may have been given in renewal of obligations of the defendant or of notes of the Monitor Graphite Company of which he was president, and the latter seems to have been the real transaction, because he admits that he gave checks on the Citizens National Bank payable to the Merchants National Bank on 8 April, 1919, one for $30.40, and the other for $205.20, the last amount being the discount on the two notes sued on for ninety days, and he says: "These checks were given for the payment of some papers that he had, some of his papers and some of the Monitor Graphite Company's papers."

"He thinks the check for $30.40 was given to cover his own personal papers." If so, the check for $205.20, the discount of the two notes in action, must have been for the Monitor Graphite Company's papers.

It is inconceivable that the defendant, educated at Chapel Hill and Cornell, and having a degree from the latter institution which "ranks with the best in the country," president of the Raleigh Electric Company and president of the Monitor Graphite Company, should have executed two notes aggregating $13,500 and have paid the discount on these for ninety days out of his own money when there was no consideration for the notes, and he should at least be held to swear upon his examination that there was no consideration, or state facts which would exclude the reasonable probability of a consideration, and having failed to do so he has not offered evidence rebutting the presumption raised by the admission of the execution of the notes.

No error.

BRYANT GREEN ET AL. v. W. H. RUFFIN AND R. H. STRICKLAND.

(Filed 24 March, 1920.)

1. Nonsuit—Pleadings—Evidence—Bills and Notes—Collateral—Equity Subrogation—Mortgages.

The plaintiff executed his note secured by mortgage, to a corporation in which the defendant was an officer, which was placed as collateral by the payee corporation to a note, endorsed by the defendant, given

by the payee corporation to another, and, thereafter, the payee corporation obtained a renewal note from the plaintiff upon agreement that the first would be cancelled. The maker corporation made several payments on its notes, among other things, with the proceeds of the sale of lands under plaintiff's mortgage, and the purchaser at the sale reconveyed the lands to the plaintiff, and in this suit the plaintiff seeks to enjoin the foreclosure of the second mortgage by the defendant officer of the maker corporation, who had then paid off the balance due on the note, and who held the collateral, including plaintiff's second note. There was evidence tending to show that defendant knew of the agreement between the plaintiff and his corporation, and plaintiff introduced a paragraph of the answer alleging the defendant was a transferee of the plaintiff's note "for value and without notice." *Held*, the case should have been submitted to the jury, there being evidence, notwithstanding the answer, that defendant was a purchaser with notice or knowledge; and. *Held, further*, that the defendant, under the equitable doctrine of subrogation, could have no further right than his corporation, as a holder of the plaintiff's note given in renewal.

2. Bills and Notes—Collaterals—Indorser—Purchase—Benefits—Estoppel.

Where a second note and mortgage has been given in renewal of the first, under agreement that the latter should be cancelled, which was not done, and the mortgaged premises has been sold under the first, and the proceeds applied to a note which the payee had given to another, an endorser on the payee's note, who has paid off the balance and holds the collateral, may not retain the benefits he has received under the mortgage sale, and repudiate the obligations of the transaction as to the renewal note, of which he had knowledge at the time.

3. Equity—Subrogation—Superior Equities—Legal Rights.

A party may not invoke the equitable doctrine of subrogation when its application would work injustice to the rights of those having superior equities, or would operate to defeat a legal right.

APPEAL by defendants from *Guion, J.*, at the November Term, 1919, of FRANKLIN.

This is an action to restrain a sale of the land in controversy under a mortgage. The facts are as follows:

R. H. Strickland, the defendant in interest, while a stockholder and vice president of the Hill Livestock Company, endorsed a note of his company's made payable to the American Agricultural & Chemical Company in the sum of $10,000. After this note matured and while collection was being pressed thereon, said livestock company, as an inducement for extension of the payment, deposited as collateral security certain notes and securities of its concern amounting to a large sum. Among the collateral so deposited was a note and deed of trust for $1,000 given Bryant Green, one of the plaintiffs. When the Green note matured he was induced by the livestock company to execute a renewal note in payment of the original, which was likewise secured by deed of trust,

conveying the identical lands that were conveyed as security to the first note. At the time of the execution of said renewal note and deed of trust Green was assured by Hill, president of the livestock company, that his first note would be marked paid, and the deed of trust secured by same would be duly canceled of record. After obtaining the renewal note and deed of trust of the livestock company, Hill represented to the First National Bank of Louisburg, N. C., that the first or original note had been deposited as collateral to a note given to the chemical company; that said original note was then past due and the chemical company was demanding its payment in cash; that the proceeds of the renewal note, which said livestock company desired to sell said bank, would be used to pay the original note, and said bank bought the renewal note and paid cash therefor. The money so received from the sale of said renewal note was paid to the chemical company, who held the original note and credited thereon. The livestock company from time to time made payments on its note due the chemical company, aggregating about eight thousand dollars, and judgment was obtained for the balance due thereon of about two thousand dollars, against the livestock company, R. H. Strickland, and others. Strickland paid the judgment and took over the collateral, which amounted to several thousand dollars. The lands conveyed in the two deeds of trust by Green were sold under the terms of the second deed of trust, and the Franklin Land Company became the purchaser. Said land company subsequently conveyed said lands to Green, the original owner. Six months after the foreclosure sale, made under the second deed of trust, the defendant Strickland attempted to foreclose under the first deed of trust, and this action is to restrain the sale.

K. P. Hill testified: "I was president of the Hill Livestock Company, and Mr. R. H. Strickland was vice president of said company. In the spring of 1914 the Hill Livestock Company executed its note to the American Agricultural & Chemical Company in the sum of about $10,000, for certain fertilizers purchased, and Mr. Strickland, J. P. Hill, and myself endorsed said note, which was delivered to the said chemical company. In the latter part of 1915, the note so executed by the Hill Livestock Company and endorsed by Mr. Strickland and myself was turned over to Mr. Jim Pou of Raleigh for collection. We went to see Mr. Pou and carried a large batch of papers, including the Green note, and delivered them as collateral security to the company's note. In January, 1916, we induced Bryant Green to give us a second note and mortgage in renewal of the first note executed in April, 1915, and deposited with Mr. Pou, under the agreement that his first note should be obtained and delivered up to him for cancellation. I discounted this second note at the First National Bank with the understanding that I

would send the proceeds thereof to Mr. Pou to be applied on the note to which Green's first note was deposited as collateral, and obtain said first note and have the deed of trust securing same canceled of record. In accordance with this agreement I sent the money, obtained from the bank on the second note, to Mr. Pou to be applied on the chemical company's note. From time to time we paid about $8,000 on the chemical company's note, which left about $2,000 due thereon. I neglected to get the first Green note and deed of trust. Mr. Strickland knew about these transactions and kept up with the payments that were made upon the chemical company's note."

The plaintiff also introduced a part of the answer of the defendant Strickland, which is as follows:

"That he ceased to be a stockholder in the Hill Livestock Company on 27 August, 1914; that he endorsed the note to the Agricultural Chemical Company for a large amount, and judgment was rendered against him, and being solvent he paid said judgment to the amount of $2,500, and said judgment and securities were transferred to this defendant for value and without notice."

At the conclusion of the evidence his Honor entered judgment of nonsuit and the plaintiff excepted and appealed.

The defendant Ruffin has no interest in this controversy except to perform his duties of trustee in the deed of trust under the directions of the court.

W. H. Yarborough and Ben T. Holden for appellants.
W. M. Person and N. Y. Gulley for appellees.

ALLEN, J. The witness Hill testified that the second note and mortgage were executed as a renewal of the first note and mortgage, which had been deposited with the chemical company as collateral, and under an agreement that the first note and mortgage, under which the defendant Strickland is asking that the land be sold, would be delivered up and canceled, and that the proceeds derived from discounting the second note and mortgage were actually paid to the chemical company in reduction of the liability of the defendant Strickland thereon as indorser.

He also testified: "Mr. Strickland knew about these transactions, and kept up with payments that were made upon the chemical company's note."

It therefore appears from this evidence that Strickland knew of the agreement to cancel the first note and mortgage, and that he received the benefit of the contract by the application of the proceeds of the second note and mortgage to the note of the chemical company, and he will not now be permitted to receive the benefits and repudiate the obligations of the transaction. See *Wilkins-Ricks Co. v. Welch,* at this term.

It is true that the plaintiff weakened the force of this evidence by

introducing a part of the answer of the defendant in which he alleged that the collateral securities held by the chemical company were transferred to him "for value and without notice," but this merely presented the case of contradictory evidence, and did not justify entering a judgment of nonsuit.

This precise question was presented in *Trust Co. v. Bank,* 166 N. C., 116, in which the plaintiff introduced evidence that a check was duly mailed and relied upon the presumption that it was received on a certain date, and after doing so introduced a part of the answer of the defendant, which tended to rebut this presumption.

A judgment of nonsuit was entered, the court being of opinion that the presumption was rebutted by the introduction of the answer by the defendant, but this Court set aside the judgment of nonsuit, the Court saying: "The fact that plaintiff introduced the rebutting evidence does not alter the case. It is not concluded thereby, but may show that the fact is otherwise, as a party is not always bound by the statement of his own witness. The *prima facie* presumption as to the time when the check was received was not rebutted by the introduction of the answer, and the question should have gone to the jury."

Again, the defendant Strickland, in order to assert his rights under the first note and mortgage, must invoke the equitable doctrine of subrogation, which "will not be permitted where it will work injustice to the rights of those having superior equities or where it will operate to defeat a legal right." 25 R. C. L., 1321.

His right to subrogation, if any, is the right to be subrogated to the rights of the chemical company in the collateral security, and as it appears from this evidence the plaintiff Green, who was the debtor in the collateral security, furnished the money, and it was actually paid to the chemical company, that company could not hold the securities as against the plaintiff Green, and if so, Strickland could not do so by subrogation.

In our opinion the case is one which ought to be submitted to a jury.

Reversed.

NAT G. SNIPES v. ARCH J. WOOD.

(Filed 24 March, 1920.)

1. Register of Deeds—Marriage License—Statutes—Penalty—Uncontradicted Evidence—Questions of Law.

Where the facts are not disputed in an action against a register of deeds to recover the penalty for his failure to make a reasonable enquiry as to impediments to a marriage for which application for license is made to him, Revisal, sec. 2090, the reasonableness of the enquiry may become a matter of law for the Court.

2. Same—Reasonable Enquiry—Affidavit of Prospective Groom.

It is not of a sufficient or reasonable enquiry, under the provisions of the Revisal, sec. 2090, as a matter of law, for the register of deeds to issue a marriage license for a woman under eighteen years of age without the consent of her father, being thirteen years old, upon the examination of the prospective bride and groom, whom he did not know and had never seen before, and a third person, whom he had seen a time or two, the first time about two weeks before, and whose character he did not know or enquire into, and erroneously assumed to be good, and that the woman was of the required age judging by her appearance; and the fact that he had required an affidavit from the prospective groom, and interested party, does not affect the result.

BROWN, J., dissenting.

APPEAL by plaintiff from *Guion, J.*, at November Term, 1919, of WAKE.

This case, as stated in the record, is as follows, it being necessary to set out the evidence, as there was a directed verdict.

The plaintiff brought this suit to recover the penalty of $200 for the unlawful issuing of a marriage license, resulting in a marriage between plaintiff's 13-year-old daughter and one Louis Zapantas, a Greek. Plaintiff further contended that the said marriage license was issued without his written consent, and that the defendant did not make reasonable inquiry as to whether there was legal impediment to said marriage.

The defendant contended that he did make reasonable inquiry, and that he did all that the law contemplated. Nat Snipes, witness for himself, testified: I have lived in Durham, N. C., all my life. Leora Snipes is my daughter. She was 14 years old 18 June, 1918, and was born in 1904, 18 June. She is now married to Louis Zapantas, a Greek. She married against my consent. I saw Arch J. Wood soon after the marriage and he said he issued the license on Zapantas' statement; that he did not know him at the time he issued the license. Leora Snipes' age was in the Bible. The Bible from which I took her age has been destroyed. She wore short dresses and did not weigh over 90 or 100 pounds. Cross-examined: My wife does not live with me. She left and went to Baltimore. I never gave my daughter a certificate to work in the factory. She worked in the factory, and I got $10 of her wages on one occasion and gave it to my wife, the factory would not pay her. I was in Virginia working at the camps and didn't know anything about my daughter working until I returned home. Plaintiff offered record of judgment in case of *S. v. Zapantas* as being some evidence tending to corroborate plaintiff. Defendant objects; objection sustained, and plaintiff excepts. The record shows that Louis Zapantas entered a plea of *nolo contendere*, being charged with marrying Leora Snipes, a female, under the age of 14, plea accepted by State.

Arch J. Wood, witness for himself, testified: In May, 1918, I was register of deeds for Wake County. I served four years, and prior to that time had served as deputy under Mr. Charles Anderson. When I was register of deeds Mr. W. H. Penny was my deputy, and he is now serving as register of deeds of Wake County. On 23 May, 1918, I issued marriage license to Louis Zapantas and Leora Snipes. On the morning of 24 May, 1918, I remember it, one J. W. Hunter of Chapel Hill, a man who had previously been in the register of deeds' office, came in with the young Greek and a young lady. The young lady seemed to be well developed and full grown, and applied for marriage license, and Mr. Hunter stated that he knew both parties, and that they were from Norfolk, and he simply brought them there for the purpose of introducing them. He ran an automobile for hire. He had previously been in my office, and I knew his face, and he told me he was there a week or two ago with other parties to get license, and I inquired of Mr. Hunter if he knew both parties, and he stated that he knew they were of legal age, and he said he believed them both to be more than 18 years of age. I questioned the Greek very closely, and asked him how long he had been knowing the young lady, and if he knew her to be 18 years old, and he stated that from his best information he believed her to be 18 years old, and he also stated that the young lady's parents knew that both he and she were engaged to be married, and that it was agreeable to all. He stated that the young lady's parents both lived in Norfolk. I also questioned the young lady separately and apart from the other two parties. I did not try to keep the other parties from hearing me. She was sitting to one side and I asked her the date of her birth, and she stated that she was 18 years old in June, 1917, and I made a record on the marriage license to that effect at that time. I also asked her if her parents knew that she was going to get married, and she said that they did, and that it was agreeable. She stated that her parents lived in Virginia. She then stated that the laws of Virginia required her to be 21 years of age, and the laws of North Carolina only required her to be 18, and that it was the reason that she was getting married here.

The Greek stated that the reason he was getting married here was because he was going to work in a restaurant in Raleigh. He also stated that it was perfectly agreeable to both parties; I made all the inquiries I knew how to make both from the parties who introduced themselves, and also from J. W. Hunter, who witnessed the marriage. I married them, and was at that time a justice of the peace. I had known Mr. Hunter something like three or four weeks. I had seen him on the streets several times, and he had been in my office once something like three or four weeks before that time. I thought Mr. Hunter was a reliable man. No statement he had ever made to me had proven to be untrue.

The paper which you hand me is the license I issued at that time, and is witnessed by W. J. Hunter, W. H. Penny, and C. T. Bailey, who were in the office at that time. I properly swore the Greek, and, as far as I knew, there was no legal impediment to the marriage at that time. Leora Snipes said that she was 18 years of age in June, 1917, and I made a record of that on the stub, and this is it. Cross-examined.

I did not know either one of the parties that morning when they came to my office. I had no reason to doubt her age as she seemed to be well grown and fully developed, and weighed about 125 pounds. I do not know that the girl would not weigh over 90 pounds. I did not know the character of Mr. Hunter in the community in which he lives. I do not know whether Hunter has ever served time on the roads of Durham County under a sentence. I never saw any one around Raleigh or anywhere else who told me what kind of man Hunter was. The first time I ever saw him according to my best recollection was about three or four weeks previously to issuing the license. I know every one called him Tank. I relied upon the statement of all three, Hunter, Zapantas, and Leora Snipes. I had seen Hunter several times before he came to my office. He told me that he did not live in Raleigh, and I knew no one in Raleigh who did know him. I do not know anything about Mr. Hunter's character. I supposed he was running an automobile for hire. I had seen him with them when he was over here. I asked Hunter where he lived the day that I issued license, and he said that he lived in Chapel Hill, N. C. He also told me that he ran an automobile for hire when he was in my office before. Hunter told me that Zapantas and wife lived in Norfolk.

The marriage license was offered in evidence. At the foot of the license is the following: Louis Zapantas, being duly sworn, says: That the parties for license are of lawful age, *i. e.*, both being over 18 years of age, and so far as he is informed and believes, there is no lawful cause or impediment forbidding said marriage.

LOUIS ZAPANTAS.

Sworn and subscribed to before me, this 23 May, 1918.

ARCH J. WOOD.

It is then stated that the parties were married by Mr. Wood, as justice of the peace, on 23 May, 1918, at Raleigh.

W. H. Penny, witness for defendant, testified: I am register of deeds of Wake County. I was chief deputy for Arch J. Wood, register of deeds in 1918, and had been in the office since 1 January, 1902. I was present when Zapantas and Leora Snipes applied for marriage license. We question and take notice of these Virginia couples because we have so many to come, and they cannot marry in Virginia until they are 21,

and they come over here from every place in Virginia. Mr. Hunter said he knew the parties well; that he was a nice Greek and a gentleman. Mr. Wood made inquiry and said to me, "What would you do in this case?" I said the girl looked to me to be 18 years old, and I went over and asked the young lady myself. I said: "Miss Snipes, how old are you? Have you run away from Norfolk with this man?" She said her parents knew it, and she could not marry in Virginia. I asked her when she was born, and she said in June, 1900. I said, "How old are you?" and she said, "18 in June, 1917." Mr. Wood asked me what would I do, and I said: "I would write them, and would have done so some time ago. Mr. C. T. Bailey was in there in addition to six other clerks. Wood asked them their ages, and they said they lived in Norfolk and could not get married there and came down here. I saw Mr. Wood when he administered the oath. Cross-examined: Q. Why did you not swear the man who brought them down and recommended them? We swear the man who applies for license, regardless of what their ages are. We always question parties from Virginia, and we can catch them by asking them the year of birth. Case for defendant.

O. L. Parham testifies as follows for plaintiff: I know the general character of Nat Snipes, and it is good. I have not known him recently. All I have heard regarding his character is that it is good. Cross-examined. I have been deputy sheriff of Wake County for about 21 years. I knew Mr. Snipes when he lived in Wake County about 20 years ago. Since that time he has been living in Durham County.

W. H. Penny, recalled for further examination: I made inquiry as to the girl's age, and she said she was born in June, 1900, and this would make her 18 years old. She married in May, 1918. I said 1900. She must have said 1898. We would not have written the license if she had said 1900.

At the conclusion of all the evidence, counsel for plaintiff moved the court for a verdict and judgment in favor of plaintiff, which was refused, and plaintiff excepted.

It was stated by the court that if plaintiff would withdraw contradictory evidence as herewith set out in record he would then direct a verdict, as a matter of law. At the close of the evidence in the cause, counsel for the plaintiff withdrew from the jury so much of the testimony of the plaintiff as relates to the statement made by the defendant as to the issuance of the license upon inquiry only of Louis Zapantas, and further consent and agree that the testimony of the witness, W. H. Penny, conflicting as to the dates between 1899 and 1900, may be corrected to the end that this testimony shall appear to be, that the statement by Leora Snipes was that she was born in 1899, and that she was over the age of 18 in May, 1918, at the time of the issuance of the license, and with

these corrections, counsel for plaintiff submitted to the court by consent and agreement that if upon all the testimony the court should be of the opinion as a matter of law, the plaintiff is entitled to recover, judgment shall be entered for the plaintiff, but that if, on the other hand, upon the whole evidence the court shall be of the opinion, as a matter of law, that the plaintiff is not entitled to recover, then judgment shall be entered in the action for the defendant.

Upon this agreement in open court, the court being of the opinion, as a matter of law, that the defendant did not issue said license knowingly and without reasonable inquiry as to the legal impediment of age to the marriage of said parties, it is adjudged that the plaintiff is not entitled to recover, to which plaintiff excepted and appealed.

J. W. Barbee and A. J. Templeton for plaintiff.
Herbert E. Norris and J. M. Broughton for defendant.

WALKER, J., after stating the case: The plaintiff admitted the facts to be as testified by the defendant and his witness, W. H. Penny, and the question of due inquiry by the defendant before issuing the marriage license therefore became one of law. We are of the opinion that there was error, unless we are to overrule the many previous decisions of this Court upon this subject. The cases, or a majority of them, will be found in *Gray v. Lentz,* 173 N. C., 346, where the law is fully stated. The Court said in *Williams v. Hodges,* 101 N. C., 303: "The license shall not be issued as of course to any person who shall apply for it. The register is charged to be cautious, and to scrutinize the application; it must appear probable to him, upon reasonable inquiry when he has not personal knowledge of the parties, that the license may and ought to be issued. The probability upon which the register should act is not such as arises from conjecture, . . . but from inquiry of trustworthy persons known to the register, who can and do give pertinent information." And in *Trolinger v. Boroughs,* 133 N. C., 315: "While we may not prescribe any rule for the guidance of the register, it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care." The case of *Cole v. Laws,* 104 N. C., 651, is equally emphatic in stating the correct principle in such instances. It is there held that "When a register of deeds issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the appli-

cation of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information: *Held,* that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect." In *Morrison v. Teague,* 143 N. C., 186, it was likewise held that, "In an action against a register of deeds to recover the penalty under Rev., 2090, for issuing a marriage license contrary to its provisions, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to the age of the young lady, and made no further inquiry of any one, the court should have given the plaintiff's prayer for instruction, that as a matter of law defendant failed to make reasonable inquiry as to the age of the plaintiff's daughter." The present *Chief Justice* said in *Laney v. Mackey,* 144 N. C., 634: "The application was made by a man whose name was not known to the defendant, whom he does not show to have been trustworthy, and as to whom the only evidence is that his general character is bad. Such inquiry as the defendant made in this case was not reasonable. It was purely perfunctory and did not furnish the security against a violation of the law requiring a proper observance of the requirements of the statute."

The Court said in *Agent v. Willis,* 124 N. C., 29: "The defendant seemed to think that an oath on the part of anybody was all that was necessary to authorize him to issue the license. But the character of the witness and accuracy of information are the things that the register of deeds should look to when he issues a license for marriage, in case where there is doubt about the age of the parties."

While the decisions cited so far are all clearly pertinent and furnish a strict analogy to this case, the language of *Justice Brown,* in *Morrison v. Teague,* 143 N. C., 186, also clearly applies, and is very persuasive, and, as we deem, controlling: "The learned counsel for the defendant, Mr. Gwaltney, most earnestly contended in his argument that upon a fair interpretation of the words 'reasonable inquiry,' the charge of his Honor should be sustained. Nothwithstanding we find ourselves unable to reconcile this view with very recent decisions of this Court, we agree with counsel that upon the evidence in the record the question was one of law, and that his Honor was correct in so holding. The uncontradicted evidence shows that the register took the word of the prospective bridegroom and his friend as to the age of the young lady, and made no further inquiry of any one; that the register did not know either Kennedy or his friend. The register's suspicion seems to have been aroused, for he inquired why they applied for license in Taylorsville, as the girl lived in Iredell; nevertheless, he made no further inquiry."

Justice Connor said, in *Furr v. Johnson,* 140 N. C., 157: "It would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register."

The case of *Joyner v. Harris,* 157 N. C., 295, is in some respects much like our case. The prospective bridegroom and his friend, and brother, who gave information to the register of deeds were both of good appearance. The register stated that he thought from their looks that they were trustworthy, and would not get him in trouble. They certainly made a very good impression on him by their frankness and general demeanor. As to this case we said, in *Gray v. Lentz, supra:* "The case of *Joyner v. Harris,* 157 N. C., 295, while in some respects not like this one, is yet, in principle, not unlike it. It referred to the rule which, as we have said, had been settled for some time in several decisions of the Court, that the register should have some reliable information before he issues the license, and not act blindly or too confidingly upon the statements of mere strangers, and especially those who are directly interested and under a strong temptation to falsify, as here. We adopted and applied the familiar rule formulated in previous cases, and held that sufficient inquiry had not been made. It is true that in *Joyner v. Harris* we treated the information given as to her age as practically a statement of the girl herself; but the case is otherwise decisive of this one. It was there said: 'If we should hold that a register of deeds can satisfy himself as to the essential facts upon such an inadequate investigation as was made in this case, we would defeat the very object and purpose of the statute to throw safeguards about the young and inexperienced, who would by reason of their youthful impulses be liable to enter into so solemn and serious a relation lightly and unadvisedly and not soberly, discreetly, and reverently, as they should do, and as the best interests of society require to be done.' The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so, that he may the better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider."

Now, applying these authorities, which seem to be uniform, to the facts of this case, the girl was under fourteen years of age. She came to the register's office on 24 May, 1918, accompanied by her lover, Louis Zapantas, and J. W. Hunter, who was represented as their friend. Hunter has been in the office once before, about a week or two before that day, on a similar errand, to get a license for another couple who were with him, and the register was told by him that he had been there on that occasion, and by this the register "knew his face." Hunter

stated to the register that he knew both parties, Louis Zapantas and his female companion, were of legal age, and "from his best information" he believed the girl to be 18 years old; that her parents knew of the engagement to be married, and approved it, and that her parents lived in Norfolk, Va. The register also questioned the girl, and she stated in substance the same thing, and that she was 18 years old in June, 1917. Asked why she came here to be married, she replied that according to the laws of Virginia, she had to be 21 years old. The Greek said he came here for the marriage because he expected to open a restaurant in Raleigh. The register testified that "he did not know either one of the parties that morning when they came to his office," but he had no reason to doubt the girl's age, as she seemed to be well grown and fully developed and weighed over 125 pounds. As to Hunter, the register said that "he did not know his character in the community in which he lived (Chapel Hill), and that no one had ever told him what kind of man Hunter was," and he further said: "I did not know the character of Mr. Hunter in the community in which he lives. I do not know whether Hunter has ever served time on the roads of Durham County under a sentence. I never saw any one around Raleigh or anywhere else who told me what kind of man Hunter was. The first time I ever saw him according to my best recollection was about three or four weeks previously to issuing of license. I know every one called him Tank. I relied upon the statements of all three, Hunter, Zapantas, and Leora Snipes. I had seen Hunter several times before he came to my office. He told me that he did not live in Raleigh, and I knew no one in Raleigh who did know him. I do not know anything about Mr. Hunter's character. I suppose he was running an automobile for hire." Hunter stated that he knew the parties well, and that Zapantas was a nice Greek and a gentleman. Defendant asked his deputy, W. H. Penny, what he would do, and the latter replied, "I would write them, and would have done so some time ago." The Greek was the only person who was sworn. This recital of the main facts in evidence does not present as strong a case for the defendant as some of those we have cited, where this Court held that there was not due inquiry, and if the facts herein are carefully compared with those set forth in the cases cited, this will more clearly appear. A register may expect that the evidence of the interested parties will not generally be reliable, and that it is unsafe to confide in it, where the parties are unknown to him and their characters are not shown by some responsible person who does know them. How this wayward couple happened to fall in with Hunter, who lived in Chapel Hill, many miles from Norfolk, Va., is not satisfactorily shown. They evidently had only a chance acquaintance, and we think the circumstances should have put a wary man on his guard. The character of Hunter was not

known to the register. He had seen him once before in his office, and casually on the streets of Raleigh three or four times, but it was only to see him. The circumstances were at least suspicious, and should have induced the defendant to have acted more guardedly. The defendant was himself doubtful, for he asked for the advice of another as to what should be done. He clearly has not brought his defense within the rule we have so often applied in such cases, and which, as stated above, is that he should not have relied upon what was said by a person whose character and responsibility was not known to him, or vouched for by some one who was known, or unless there are other circumstances from which he can form a reliable judment as to the facts. Here there was really nothing upon which to base a decision, except the statements of the interested parties, and that of Hunter, who manifestly got his information from them, if he had any at all, and that is really what he testified. He did not pretend to know the girl's parents or to have ever even been with them, or where he could have acquired any knowledge of the facts, except from the parties themselves. He did not conceal his ignorance of the facts even adroitly, but very clumsily, and so acted as to arouse a keen suspicion as to the truth of his statements. It is to be noticed that Hunter never answered defendant's questions directly and fully, but evasively, and he never said where he got his information, nor did the Greek answer any more fully. We do not know where he got it unless from the girl. Will this do, under the statute? If so, it might as well be repealed, as being of no protection whatever to girls of tender years who are prone to act imprudently and unwisely in such important matters, and to decide impulsively, rather than deliberately, upon a question which so vitally concerns their future welfare and happiness, and we know what is generally the unfortunate result. It was partly to prevent this misfortune that the statute was passed. We should, therefore, be very careful to see that the intention of the Legislature is properly executed, and that no license is issued until after reasonable inquiry. It appears in this record that the man was indicted for marrying this girl, who was five years under the required age, and that he pleaded *nolo contendere*, thereby virtually confessing his criminal wrong. We are not basing any part of our decision on this fact, as the evidence of it was ruled out, but merely refer to it incidentally as showing how boldly and recklessly a man will commit two crimes to accomplish his purpose in such cases, and how essential it is that our officers, charged with the duty of issuing marriage licenses, should require some *reliable* evidence of the woman's age, and not trust to the statements of the parties, and some casual and accomodating outsider, whose character is not known, and who, in the generality of cases, as our records surely attest, proves to be utterly irresponsible and untrustworthy. That the defendant in this

case acted honestly, and with the very best of intentions, we have not the least doubt, and, if he had followed his own first impression, he would have acted more wisely and considerately. The parties should have been required to furnish more reliable proof of the facts than they did, or go somewhere else where they were better known, as that which they did offer was, at least, suspicious, and the truth thinly veiled. We regret the result, but we are bound to enforce the law as construed by a long line of our decisions, extending back almost to the day when the statute was enacted.

This case is a striking illustration of the necessity for a strict compliance with the statute, as we have construed it. Practically everything these people told the register was false, and knowingly false, and the violation of the law by the parties resulted from not requiring at least some reliable or trustworthy information as to the facts, instead of confiding in Hunter, whose very admission and conduct showed that he was not speaking with any knowledge of them. This case is as clear as any we have cited, if not clearer than any.

We must reverse the decision of the judge if we follow our cases, and direct that judgment be entered in the court below for the plaintiff, according to the agreement, and it will be so certified.

Reversed.

BROWN, J., dissenting.

HAMMER LUMBER COMPANY v. SEABOARD AIR LINE RAILWAY AND EASTERN MACHINERY COMPANY, ET AL.

(Filed 24 March, 1920.)

1. Carriers of Goods — Railroads — Attachment — Freight — Advance Charges—Liens—Continued Transportation—Bills of Lading—Vendor and Purchaser—Bills and Notes—Order Notify.

When a shipment of freight by common carrier by rail is to consignor, notify the purchaser, with bill of lading attached to draft, which the purchaser pays, but refuses the shipment as not according to a certain test agreed upon, and there being back-freight charges on the shipment to the consignor and reshipped upon the same car, not appearing on the purchaser's bill of lading, except as "advance charges," in proceedings in attachment by the purchaser to recover the money he had paid to the consignee, *Held*, the back-freight charges constituted a lien on the shipment in the carrier's favor, and enforcible out of the proceeds of the sale under the proceedings in attachment.

2. Carriers of Goods—Connecting Carriers—Freight—Advance Charges—Subrogation—Equity.

Where a common carrier pays the charges of a preceding carrier in the transportation of a shipment of goods, it is subrogated to rights of that carrier and may demand the entire freight charges before surrendering the shipment.

3. Carriers of Goods—Railroads—Vendor and Purchaser—Attachment—Demurrage—Liens.

Where demurrage charges have accrued on a consignment of goods by reason of attachment proceedings in a controversy between the vendor and purchaser upon the refusal of the plaintiff to pay its proper freight charges, the carrier has its lien for the demurrage thus caused.

APPEAL by defendants from *Allen, J.*, at October Term, 1919, of NEW HANOVER, from a judgment upon the pleadings by *Allen, J.*, against the Seaboard Air Line Railway and Walker D. Hines, Director General.

The judge by consent found the facts as follows: The Easton Machinery Company had shipped to it at Allenton, Pa., from Utica, N. Y., two carloads of boilers, the subject of this controversy; at Allenton, Pa., the said Easton Machinery Company, without paying said charges and without unloading, reshipped the said two cars of boilers on bills of lading from Allenton, Pa., to Wilmington, N. C., to its own order, "Notify Hammer Lumber Company" (the plaintiff), which bills of lading came with a draft on the Hammer Lumber Company for $800 attached, payable to the order of Easton Machinery Company, which, when presented, was duly paid by the plaintiff; said draft was a part of the purchase money of $1,400 agreed to be paid for said boilers, and the balance of $600 was to be paid provided the boilers stood a certain agreed test at Wilmington, and were accepted by plaintiff; they did not come up to the agreement and were rejected by plaintiff after they were subjected to the test at Wilmington; no part of this agreement was known to the railway company; the said boilers arrived at Wilmington 25 August, 1919, and on 9 September the plaintiff caused a warrant of attachment to be levied thereon as the property of the defendant Easton Machinery Company, it having refused to refund to plaintiff the said sum of $800, which had been paid on their draft under the agreement to refund if the boilers failed to stand the agreed test. The plaintiff tendered to the agent of the carrier at Wilmington the freight and all charges from Allenton, Pa., to Wilmington, N. C., up to and including 23 September, 1919, together with the bills of lading above mentioned, but the defendant railroad company refused to receive the same unless the plaintiff would also pay the "advance charges from Utica, N. Y., to Allenton, Pa., of $236.36," said sum being shown on the way bill as advance charges, but no notice of same being shown on the bill of lading.

The Hammer Lumber Company recovered judgment against the Easton Machinery Company for $1,453.29, and it was further adjudged that the plaintiff pay into court the sum of $236.36, the amount shown on the way bill as advance charges to wait the further order of the court and further that the plaintiff pay to the carrier the sum of $416.93 being the freight and charges from Allenton to Wilmington admitted by the plaintiff to be due, and directed the sheriff to sell the said boilers, and after paying into court the charges for demurrage accrued against said shipment since 23 September, 1919, amounting to $267.80 and costs of sale, to pay over the balance to the Hammer Lumber Company.

The court further held, as a matter of law, that the defendant, Seaboard Air Line Railway Company and Walker D. Hines, Director General, are not entitled to recover the said sum of $236.36 due for advance charges from Utica, N. Y., to Allenton, Pa., as marked on the way bill.

The defendants, Seaboard Air Line Railway and Walker D. Hines, superintendent, excepted to the judgment that they were not entitled to recover said advance charged out of the proceeds of the sale of the boilers, nor the $267.80 demurrage charges up to the sale.

J. A. McNorton for plaintiff.
John D. Bellamy & Son for defendants.

CLARK, C. J. The shipper of the machinery was the Easton Machinery Company at Allenton, Pa., who reshipped on the same cars this freight which it had received from Utica, N. Y. The bill of lading to the plaintiff carried only the charges on the freight from Allenton to Wilmington, but the way bill showed that there were "advance charges" from Utica to Allenton, and the freight came through without having been taken off the cars at Allenton. There was an agreement between the plaintiff and the shipper that if the freight did not come up to a certain test, which it did not do, the plaintiff could return it. The carrier had no knowledge of this agreement.

When the boilers were rejected by the plaintiff, it tendered payment of the freight and charges from Allenton to Wilmington, and attached the boilers for the $800, which it had advanced on a draft from the consignor and for which it claimed the return, and for the freight paid. The carrier contended that it had a lien upon the freight for the entire transit charges from Utica, N. Y., to Wilmington, N. C., which the plaintiff denied, but paid the freight and charges on the goods from Allenton to Wilmington, and, under the order of the court paid into the court the charges from Utica to Allenton to abide the judgment of the court.

We think the court was in error in holding that the carrier was not entitled to his lien upon the freight for the advance charges from Utica to Allenton. In Hutchinson on Carriers (3 ed.), sec. 660, it was held that the shipper of goods may at any time countermand the directions as to consignment and require the carrier to redeliver to himself, and that when the consignor changes the destination or diverts the goods to a new consignee the reconsignment does not break the connection. *Trading Co. v. R. R.,* 178 N. C., 182, but the new destination is regarded as the original one, quoting *Myers v. R. R.,* 171 N. C., 190.

The carrier has a lien on goods to secure the payment of freight and charges in the nature of demurrage, accruing during its transportation, Hutchinson on Carriers (3 ed.), sec. 862. The freight charges are a lien on the goods transported, and when one carrier pays the charges of a preceding carrier it is subrogated to the rights of that carrier, and may demand the entire freight charges before surrendering the shipment. *R. R. v. Pearce,* 192 U. S., 397.

The bill of lading in this case showed that the shipment was from the Easton Machinery Company to itself, as consignee with order "Notify Hammer Lumber Company." When the plaintiff took up the bill of lading, paying the $800, and later attached the goods for a breach of agreement between itself and the Easton Machinery Company, it was only entitled to take the goods subject to any lien thereon which the Easton Machinery Company owed thereon, which included the "advance charges" for the shipment from Utica, N. Y., to Allenton, Pa.

As between the purchaser, the Hammer Lumber Company, and the Easton Machinery Company, the former owed only the purchase price plus the freight from the point of shipment expressed or implied, *i. e.,* from Allenton, but as between the Easton Machinery Company and the carrier the shipment being to the Easton Machinery Company as consignee, that company could only receive the boilers upon payment of all the charges due the carrier thereon by the Easton Machinery Company, *i. e.,* from Utica to Wilmington, and the plaintiff was not entitled to demand the delivery of the boilers nor to subject them to the debt due it by its vendor until the payment of all the charges thereon due by the Easton Machinery Co. The judgment must be reversed and entered directing payment to the carrier of the sum deposited in court, $236.36, and the costs attending the controversy over said matter.

The carrier also excepted because the court adjudged that $267.80, the demurrage charges, war tax, etc., accruing between 23 September, 1919, when the boilers were attached, down to 23 October, 1919, when they were sold, should be paid to the carrier. The carrier was entitled to a lien for said charges and payment thereof out of the proceeds of the sale of the goods, the demurrage not having been caused by any default on its part.

A carrier cannot enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee, *Hockfield v. R. R.*, 150 N. C., 419. Nor hold the goods for a lien for back freight on other goods. But the demurrage charges here were caused by the failure to pay the rightful charges due upon these identical goods, which were due by the consignor, who had shipped them to the order of itself as consignee, and the carrier could not be deprived of such lien by a delay to deliver caused by the controversy between the vendor and vendee, and the failure of the plaintiff to pay the rightful charges.

Reversed.

JOHN S. BROWN ET AL. v. GEORGE C. JACKSON, SHERIFF OF NEW HANOVER COUNTY, ET AL.

(Filed 31 March, 1920.)

1. Taxation—Corporations—Stockholders.

Under the provisions of the Machinery Act of 1917, ch. 23, in order for the stockholder to be relieved from paying taxes on his shares of stock in a domestic corporation it must appear that the corporation itself pays a tax on its capital stock, and in foreign corporations, that two-thirds in value of its entire property is situated and taxed in this State, and that the said corporation pays a franchise tax on its entire issued and outstanding capital stock at the same rate paid by domestic corporations.

2. Same— Foreign Corporations— Domestic Corporations — Railroads — Payment by Corporation.

Under the provisions of ch. 77, Laws of 1899, being "An act to ratify the consolidation of the Petersburg Railroad Company with the Richmond and Petersburg Railroad Company, under the name of the Atlantic Coast Line Railroad Company of Virginia, and to incorporate the said Atlantic Coast Line Railroad Company in North Carolina," a corporation is created with power to sue and be sued, etc., and it is a domestic corporation.

3. Constitutional Law—Taxation—Corporations—Foreign Corporations—Domestic Corporations.

Ch. 23, sec. 4, Laws of 1917, being the Machinery Act, relieving the shareholders in foreign and domestic corporations from paying tax on their shares therein when, in case of domestic corporations, the corporation itself pays this tax on its capital stock, and in case of foreign corporations, when two-thirds of the value of their property is situated in North Carolina, and they pay a certain franchise tax, etc., is within the constitutional powers conferred on the Legislature, and is a valid enactment.

4. Taxation—Corporations—Shareholders.

The plaintiff's stock was issued by the Atlantic Coast Line Railroad Company of Virginia, a corporation created by the act of the Legislature

of Virginia, and not by the corporation created by the General Assembly of North Carolina, and it not appearing that two-thirds in value of the property of the Virginia corporation is situated in this State, and it not appearing that said foreign corporation pays a franchise tax on its entire issued and outstanding stock in accordance with the statute, the plaintiff's stock is taxable in the hands of the shareholder, and does not come within the proviso in the statute.

WALKER, J., not sitting; CLARK, C. J., concurring; ALLEN, J., dissenting, but agreeing that the statute is constitutional.

INJUNCTION, returnable before *Stacy, J.*, at Spring Term, 1920, of NEW HANOVER.

An injunction was issued in this case restraining the defendant from collecting taxes assessed and levied upon certain shares of stock issued by the Atlantic Coast Line Railroad Company of Virginia, and belonging to the plaintiff and his associates. The injunction was returnable before *Stacy, J.*, in the county of New Hanover, on 29 July, 1919. His Honor dissolved the injunction, and the plaintiffs appealed to the Supreme Court.

J. O. Carr and Tillett & Guthrie for plaintiffs.

Attorney-General Manning, Assistant Attorney-General Nash, and Marsden Bellamy for city of Wilmington.

Robert Ruark for county of New Hanover.

BROWN, J. This action is brought to enjoin the sheriff of New Hanover county from collecting taxes upon the shares of stock issued by a corporation called the Atlantic Coast Line Railroad Company of Virginia, owned by the plaintiffs, all of whom are residents and citizens of the State of North Carolina. It is contended that the plaintiffs are not required to list or pay the taxes upon said stock under the Machinery Act of 1917, ch. 23, latter part of sec. 4, which reads as follows:

"Individual stockholders in any corporation, joint-stock association, limited partnership or company paying a tax on its capital stock shall not be required to pay any tax on said stock or list the same, nor shall corporations legally holding capital stock in other corporations upon which the tax has been paid by the corporation issuing the same be required to pay any tax on said stock or list the same.

"Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any shares of its capital stock if two-thirds in value of its entire property is situated and taxed in the State of North Carolina, and the said corporation pays a franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations."

The General Assembly for a long number of years has required domestic corporations to pay the tax upon the corporate stock, and when so done the shareholder is not required to list the stock for taxation. It is not necessary for us to discuss the reasons which have prompted the General Assembly to subsequently reënact the above quoted statute for so many years.

In order that the stockholder shall get the benefit of the statute, it must appear not only that the corporation is a domestic corporation, but that the corporation itself pays a tax on the capital stock. In the answer of the Tax Commission in this case, it is expressly denied that "the said corporation has paid taxes upon any valuation of its property which included the value of the capital stock of the Atlantic Coast Line Railroad Company, or that the said company pays a tax on its capital stock in this State."

There is no evidence whatever in this record nor any finding of fact to justify the conclusion that the Atlantic Coast Line Company pays taxes upon its capital stock to the State of North Carolina.

We agree with the learned counsel that the Atlantic Coast Line Railroad Company of Virginia is a corporation of the State of North Carolina, and that it was so decided in *Staton v. R. R.*, 144 N. C., 145, and affirmed in *R. R. v. Spencer,* 166 N. C., 522.

While this is true, there is another corporation known as the Atlantic Coast Line Railroad Company of Virginia, which was incorporated by the Legislature of Virginia, and is a foreign corporation.

The Atlantic Coast Line Railroad Company referred to in the *Staton case* is a domestic corporation, created by the General Assembly of North Carolina on 13 February, 1899, ch. 77, Act 1899, the title of the act being as follows: "An act to ratify the consolidation of the Petersburg Railroad Company with the Richmond and Petersburg Railroad Company, under the name of the Atlantic Coast Line Railroad Company of Virginia, and to incorporate the said Atlantic Coast Line Railroad Company of Virginia in North Carolina." This is the only statute enacted by any General Assembly of North Carolina relating to this matter. It creates a North Carolina corporation by the same title as the Virginia corporation, and enables it to own and operate certain railroads, etc., upon condition that the property of the said Atlantic Coast Line Railroad Company of Virginia, in this State, shall always be liable to taxation under the Constitution and laws of this State, and that the said corporation shall be subject to the tariffs, rules, and regulations prescribed by the board of railroad commissioners.

It is a well known fact that prior to that act, the Wilmington & Weldon Railroad Company, a part of the Atlantic Coast Line system, claimed entire exemption from taxation on its property under the terms

of its original charter. This Act of 1899 contains no special provisions fixing the amount of the capital stock, the number of shares, or the conditions under which it may be issued. It is perfectly apparent that there was no purpose to issue any stock certificates under the authority of that act, and it is not claimed that any were ever issued by its authority.

It seems to us too plain for argument that there are two corporations called by the name of Atlantic Coast Line Railroad Company of Virginia, one created by the Legislature of North Carolina, a domestic corporation, hereinbefore referred to, and one created by the Legislature of Virginia, which is a foreign corporation.

The North Carolina corporation is simply an ancillary corporation of the Atlantic Coast Line system, which is empowered to own property and may sue and be sued, but has never issued any stock. All of the stock of the Atlantic Coast Line was issued by the parent corporation, chartered by the Legislature of Virginia, which is plainly a foreign corporation. The stock certificates themselves show on their face that they were issued by a corporation "incorporated under the laws of the State of Virginia." Thus it is manifest that the plaintiff's stock was not issued by a domestic corporation and by authority of the State of North Carolina, but by a foreign corporation, and by authority of the State of Virginia.

In order that the plaintiffs may avail themselves of the latter clause of the act of 1917, hereinbefore quoted, the statute is peremptory that it must appear that two-thirds in value of the entire property of the Atlantic Coast Line Railroad Company of Virginia (the foreign corporation) is situated and taxed in the State of North Carolina, and that the said corporation pays franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations. Nothing of that sort appears in this record, and we do not understand that it is claimed that it does.

It is said that this stock has not been listed for taxation by its owners under the generally accepted belief that it was not required, and that this interpretation of the law has been heretofore acquiesced in by the State taxing officials. This may be true, as the matter has never been brought to this Court before. While the writer sincerely regrets the misunderstanding and consequent disappointment to owners of the stock growing out of such misunderstanding, yet each judge must interpret the legislative will as he finds it written according to his sincere convictions, and to the majority of this Court the conclusion seems to be irresistable that the plaintiff's stock was issued by a foreign corporation, and, being owned by citizens of North Carolina, it is subject to the tax levied by the General Assembly, inasmuch as it does not come within the exception contained in the statute.

The Southern Railway is a Virginia corporation, chartered by the Legislature of that State. Its stock is issued just as the Atlantic Coast Line stock is issued, by authority of the Legislature of Virginia. The stock of the Southern Railway owned by citizens of North Carolina has always been required to be listed for taxation.

In conclusion, we do not question the validity of the statute hereinbefore quoted, which has been the legislative tax policy of this State for so many years. Acting within its constitutional powers, it is for the Legislature to determine the subjects of taxation, and it is not ours to declare what it shall include and what it shall omit.

Affirmed.

WALKER, J., not sitting.

CLARK, C. J., concurring: I concur fully in the opinion of *Mr. Justice Brown* for the Court in this case, who makes it entirely clear that the Atlantic Coast Line of Virginia as chartered by the State of Virginia is alone authorized to issue the stock, and that the North Carolina incorporation of the same is an ancillary, or subsidiary corporation, without authority to issue stock, and which in fact has issued none. It was incorporated in this State for the purpose of making it a domestic corporation, that our courts might have jurisdiction of its operations here. This was done at a time when it was necessary to procure a recharter of that part of its line which lay between Weldon and the Virginia State line, which this State refused to do except upon the condition that it should become a North Carolina corporation for the purpose of jurisdiction, and of control by the State of its operation in this State. Ch. 544, Laws 1891; *Allen, J.*, in *Cox v. R. R.*, 166 N. C., 656; chs. 100 and 284, Pr. Laws 1893. In the same manner this State has required the domestication here of insurance and other companies before authorizing them to do business in this State, but did not authorize this company nor the other companies thus incorporated here to issue stock. Rev., 1194, 3900-3902, 4747.

In *Cox v. R. R.*, 166 N. C., 654, *Allen, J.*, says that it had been held in the *Staton case:* "From an examination and consideration of the acts of the General Assembly of this State, the defendant was a domestic corporation, at least in so far as it was *necessary to give the courts of this State jurisdiction* over causes of action arising in this State."

I also concur in the ruling that if this were a domestic corporation, even then under the terms of the statute the stock would not be exempt from taxation, though that matter is purely hypothetical and *obiter dictum* in view of the holding that this is stock in a foreign corporation.

However, as this matter has been dwelt upon in the dissenting opinion, it is not improper for me to say that in my opinion, even if this stock

had been issued by a domestic corporation, the Legislature has no power to exempt it from taxation, and therefore the Court should be very slow to assume that the Legislature passed an act that is unconstitutional.

The Constitution of North Carolina, Art. V, sec. 3, provides: *"Taxation shall be by uniform rule and ad valorem.* Laws shall be passed taxing, by uniform rule, *all* moneys, credits, investments in bonds, *stocks,* joint-stock companies, or otherwise; and also, all real and personal property, according to its true value in money."

There is such a thing as "collecting taxes at the source," which originated probably in the National Banking Act, and the Legislature might direct that the taxes upon the stock in any corporation should be deducted from the dividends, if any, declared in favor of each stockholder, and that the companies shall pay the same direct to the State Treasurer and to the sheriff of the county where each stockholder resides, and upon certificate thereof each stockholder should be exempted from further tax thereon; but that is not what is asserted here, which is merely that if the company pays taxes on its capital stock, a very small tax upon the company itself, that the stockholders shall be exempt from payment of all taxes upon their individual property, *i. e.,* the stock which they hold.

John H. Brown is the sole plaintiff in this case, and George C. Jackson, sheriff of New Hanover, and T. D. Meares, clerk and treasurer of Wilmington, are the only defendants. The Atlantic Coast Line Railroad Company has no possible interest in this controversy, and hence is not a party.

The plaintiff not only admits, but alleges in his complaint as the basis of his action, that he is the *owner* of the 50 shares of stock which he asks us to declare exempt from taxation, and that other *owners* of such stock will be benefited by the exemption if we accord it to him.

Shares in a corporation are the individual property of each stockholder, and are not the property of the corporation. The shares of stock are not assets of corporations, but are always charged up in their reports as a "liability." The certificate of shares is a receipt or due bill for the money paid in, or supposed to be paid in, by the holder, and on which he expects to receive dividends in lieu of interest. Consequently, each stockholder is liable for the tax upon his own property, and cannot be exempted from taxation by any statute on the ground that the company pays taxes upon its own property.

In *Comrs. v. Tobacco Co.,* 116 N. C., 446, this Court held, in accordance with the decision rendered by *Chief Justice Smith* in *Belo v. Comrs.,* 82 N. C., 415; 33 Am. Rep., 688, and of *Ashe, J.,* in *Worth v. R. R.,* 89 N. C., 305, and indeed in accordance with all legal authorities and text-books, as follows: "As to corporations, by all the authorities, it is in the power of the Legislature to lay the following taxes, two or

more of them in its discretion at the same time: (1) To tax the franchise (including in this the power to tax also the corporate dividends). (2) The capital stock. (3) The real and personal property of the corporation. This tax is *imperative* and not discretionary under the *ad valorem* feature of the Constitution. (4) The shares of stock *in the hands of the stockholder.* This is also *imperative* and not *discretionary.*"

This last, of course, is due by the owner thereof, the stockholder.

It is further said in the same case, on the identical point presented here, as follows: "Originally the tax upon the shares of stock was collected of the individual shareholders at their several places of residence. *Buie v. Comrs.,* 79 N. C., 267. But under that method many shares failed to be listed for taxation. Besides, the shares of nonresident owners, except those of national banks, escaped taxation in this State under the ruling in *R. R. v. Comrs.,* 91 N. C., 454. To remedy this, the provision was passed which is section 14 of chapter 296, Laws 1893 [which has been substantially reënacted at every session of the Legislature since], and which requires the list of shares to be given in by the proper officer of the corporation, which shall pay the same in behalf of the shareholders. This does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the State in collecting the tax. The effect is merely to change the *situs* of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as was held in *Wiley v. Comrs.,* 111 N. C., 397. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in national banks. . . .

"The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and under the Constitution must be taxed *ad valorem* like other 'property belonging to the holder, independently of the taxation upon the corporation, its franchises, etc.' "

This case has been cited with approval. *Comrs. v. S. S. Co.,* 128 N. C., 559; *Lacy v. Packing Co.,* 134 N. C., 571; *S. v. Wheeler,* 141 N. C., 775; *Land Co. v. Smith,* 151 N. C., 72; *Pullen v. Corporation Commission,* 152 N. C., 554; 58 L. R. A., 590, 594, 601, note; 60 L. R. A., 367, note.

To the same effect are the decisions throughout the country, which can be found grouped in the elaborate notes to *State Board v. Coggin* (Ill.), 58 L. R. A., 513-618, which cite the above case at pages 590, 594, 601. On page 594 it quotes from *Chief Justice Waite,* in *Tenn. v. Whitworth,* 117 U. S., 129, as follows: "In corporations four elements of taxable value . . . are sometimes found: (1) franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4)

shares of the capital stock *in the hands of the individual stockholders.*"

In *Pullen v. Corporation Commission,* 152 N. C., 553, *Manning, J.,* for the Court says: "It is likewise well settled by the language of our State Constitution, by many decisions of this Court, and of the Supreme Court of the United States, and now generally accepted law, that the property of a shareholder of a corporation in its shares of stock is a separate and distinct species of property from the property, whether real, personal, or mixed, held and owned by the corporation itself as a legal entity. It would be useless to cite authority to support a proposition so well established and generally accepted."

Brown, J., in the same case, concurring, says, at page 562 (68 S. E., 162): "I agree, also, that it is well settled that the shares of stock in any corporation, when owned by individuals, are separate and distinct property from the assets of the corporation and may be taxed as such."

In the same case *Hoke, J.,* at p. 582 of 152 N. C., says, quoting from *Bank v. Tenn.,* 161 U. S., 146: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Van Allen v. Assessors,* 3 Wall., 573; *People v. Commissioners,* 4 Wall., 244, cited in *Farrington v. Tennessee,* 95 U. S., 687.

"This statement has been reiterated many times in various decisions by this Court, and *is not now disputed by any one.*"

The stock held by each shareholder in a corporation is the individual property of the shareholder to be sold, devised, or disposed of at his will alone. It is in no sense the property of the corporation, or in any wise subject to its control, and the General Assembly under the Constitution must tax it as the property of the owner by uniform rule. It cannot be exempted from taxation in the hands of the owner because the corporation is required to pay tax upon its own property or privileges.

This action seeks to secure by judicial construction the exemption from taxation of, it is estimated, $4,000,000 of Atlantic Coast Line stock owned by residents of this State, and thus make it a "nontaxable 7 per cent stock." This would throw upon those not able to own such stock —upon the laborers, farmers, and others who create the wealth of the State, in addition to their own taxes already sufficiently high—the payment of this tax, which should be paid (under the Constitution and in justice) by those who are able to invest their surplus in the stocks of this corporation.

By Ordinance 34, Convention of 1866, those in control of the Wilmington & Weldon Railroad Company (the predecessor to this corporation) which had been largely built by the issuance of State bonds, procured the privilege under which every holder of $1,000 of any valid

State bonds (which a few years later were refunded by the State at 40 cents, *i. e.,* $400 in new 4 per cent bonds) could present it to the State Treasurer and would receive in exchange ten shares of the State's $1,500,000 stock in the then Wilmington & Weldon Railroad. This stock by the process of watering its shares and distributing bonds as bonuses to its stockholders is now worth $40 or more for every $1 so invested. See *Allen, J., Cox v. R. R.,* 166 N. C., at page 655. This should be sufficient without now exempting this stock from all burdens of the State, county, and city governments, on the alleged ground that the corporation pays taxes upon its own property, for which it is liable like all property holders.

There was a time when this corporation, and also the Seaboard Air Line Railway (and the predecessors of both), claimed and obtained for many years an exemption from taxation on their property. This exemption from all taxation by the corporation itself continued down till 1892, when, in *R. R. v. Alsbrook,* 110 N. C., 137, it was declared that such exemption was contrary to the State Constitution, which required a uniform taxation on all property and the exemption was held invalid. On a writ of error to the United States Supreme Court, this decision was, in every respect, affirmed (*R. R. v. Alsbrook,* 146 U. S., 279), and it has often since been cited as authority. See citations in Anno. ed.

It would be sardonic to restore this exemption from taxation which was taken from the company itself by transferring the exemption to the stock in the hands of the stockholders. Indeed, if the stock of one corporation can be exempted from taxation because the corporation pays tax on its own property, then the stock of every corporation in the State can be thus exempted, and there will be a gross partiality in exempting "stocks" which are named in the Constitution as liable for taxation *ad valorem,* while all others must pay taxes on their property of every description. There is no reason why those rich enough to invest in stocks shall be exempted from taxation, which will thus be thrown upon those who have no surplus to invest in that manner. If stockholders can be exempted from taxation on their stocks because the corporation pays tax on its own property, with equal reason the mortgage bonds issued by such corporations should be exempt because the corporation pays taxes on the property covered by the mortgage.

Of all times, when high taxation causes complaint, there should be equality, and no special privileges by reason of the exemption of the property of those who are best able to bear it.

The Constitution of this State, Art. V, sec. 3, specifies the only property which may be exempted from taxation, and in it there is no authority to the Legislature to exempt the *owners* of the "stocks" and "bonds" of any corporation from payment of taxes upon the true value thereof because the corporation has paid taxes (as it rightly should do)

upon its own property nor for any other reason. In that same article, sec. 5, there is authority to exempt "wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries and scientific instruments, or any other personal property, to a value *not exceeding* $300." But the State has felt so poor that every farmer and mechanic for more than 50 years has been required to pay taxes on his clothing for his family, his household and kitchen furniture, his blacksmith's and farming tools and plows "above $25," until, the matter being called to the attention of the Legislature (see concurring opinion in this Court, *Wagstaff v. Highway Commission,* 177 N. C., at bottom of page 360), this exemption was raised to $300 for the first time by the Legislature of 1919.

Those who labor and toil have been required to pay taxes on everything above $25—on their pots and pans, the washing tub of the washerwoman, the farmer on his plows, the blacksmith on his tools, and every one on everything above $25. This has been the policy of this State as declared by the Legislature. We are now asked to say that the Legislature, contrary to the equality of taxation required alike by the Constitution and by justice, had power to exempt, and has exempted, the owners of many millions of dollars of the best property in the State, the stock of its most prosperous corporation, from paying any share of the burden of maintaining the Government under which they live, and thus make it nontaxable, though this Court and the United States Supreme Court have held that the property of the corporation itself could not be exempted from taxation by the act of the Legislature.

It is a maxim of the law, as well as of political economy, that the "power to tax is the power to destroy," and there is no power more deadly to the prosperity of a people than to increase taxation on those of small means, and who by their labor and their efforts earn a bare living, by exempting the wealthy, and powerful aggregations of wealth, whose just share of taxation must thus be paid by the class that is less wealthy and influential.

The Constitution provides that the taxation laid upon the poll "shall *never* exceed $2" for State and county purposes, and that this shall be applied solely to "education and the support of the poor." And this Court so held in 3 cases in 148 N. C., *i. e., R. R. v. Comrs.,* 148 N. C., 220, 245, *Judge Connor* saying: "This question cannot arise again"; *R. R. v. Comrs.,* 148 N. C., 248, and *Hoke, J.,* in *Perry v. Comrs.,* 148 N. C., 521. This limit has been constantly exceeded since, and poll taxes as high as $7 and $8 per capita have not been infrequent, and the proceeds have been often used, not solely "for education and the support of the poor," but to relieve the property of the wealthy from taxation.

A poll tax was levied once in England when it caused Wat Tyler's Rebellion, and was repealed. For long centuries it has been unknown there. It survives in this country in very few States (named by *Connor, J.*, in *R. R. v. Comrs.*, 148 N. C., 244; see, also, *ibid.*, 253), and in them it is appropriated to "education and the poor." The poll tax is essentially unjust because exacted regardless of ability to pay, and is condemned by all writers on political economy. It is further unjust here because those unable to pay it are disfranchised, which penalty is not inflicted upon those failing to pay taxes on their property, though this last discrimination is to be removed by a constitutional amendment which is to be voted on this year. But if the State has been so pressed that it has been unable to dispense with a tax on the poll so universally condemned as unjustly discriminatory, certainly it is a violation of the spirit as well as the letter of the Constitution if the Legislature has attempted to exempt the *owners* of stock in all corporations, or in this corporation, from payment of their just dues thereon for the maintenance of the Government.

The constant attempt to procure from Congress and State Legislatures an exemption of the property of corporations and of the wealthy, or to procure from courts a construction of statutes to that effect is a great and just cause of public dissatisfaction.

After a hundred years ruling that Congress could levy an income tax, the United States Supreme Court, after reaffirming that ruling, by a change of the vote of one judge reversed it, which caused the adoption of the Sixteenth Amendment over the power of aggregated wealth, and, without the income tax and the excess profits tax thus authorized, it would have been impossible for this country to have carried to a successful conclusion the great "World War." But in the interval between the action of the changeable judge, and the enactment of the Sixteenth Amendment, many billions of taxes were taken off of the great corporations and the wealthy upon whom Congress had placed an income tax, and the burden was transferred to the backs of the toiling millions who were already overtaxed.

The time was when—

> "Rome veiled earth with its haughty shadow,
> And filled it, till the o'er canopied horizon failed,
> With the rushing of her wings."

By the power of taxation which exempted or favored the wealthy and transferred the burden to the masses, its fairest and most fertile provinces became a desert. As Pliny said: *"Latifundia perdidere Italiam"* —that is, "The accumulation of wealth by the few destroyed Italy."

In France, the same discrimination exempting property in the hands of the wealthy from just taxation and passing the burden on to those who created the wealth of the country resulted in the French Revolution, which took from the hands of the nobility and the church their accumulated property in its entirety and placed it in the hands of the people. The same cause has brought about the confiscation of the vast wealth of the Czar and the nobility in Russia and has divided it among the people. In this country we have built our Constitution upon the foundation of "equal rights to all and special privileges to none." And as long as that is observed by lawmaking bodies and the courts our troubles will be but light.

When a proposition is presented to this Court that the Legislature has enacted, or can enact, that the owners of surplus wealth which happens to be invested in the stocks and bonds of corporations are exempt from taxation whenever the corporation has paid taxes on its own property, it is within my duty as a member of this bench to plainly state that the Constitution of this country and the safety of its institutions will not permit, and that the Legislature has not in fact enacted so dangerous a measure against which all history is a warning.

The State Tax Commission held that the plaintiff was not entitled to have his stock exempted from taxation, and in the Superior Court Judge Stacy dissolved the restraining order and filed an opinion giving his reasons. There was no appeal from this order and judgment, but the plaintiff undertook to have Judge Stacy reconsider and reopen the matter for argument and rehear it upon the same state of facts. This was a most irregular proceeding, and was condemned in *Bonner v. Rodman*, 163 N. C., 1. At this rehearing, however, Judge Stacy again affirmed his ruling that the plaintiff was not entitled to have his stock exempted from taxation and filed a very conclusive opinion.

In *Blake v. Askew*, 76 N. C., 326, *Reade, J.*, said: "This is manifestly a feigned issue" and "not fit to be entertained." It cannot be said that this is manifestly "a stock speculation action," but it may be shrewdly suspected to be intended to procure a ruling by the Court that, though the plaintiff's stock has not been exempted from taxation by the Legislature, the Legislature has power to do so hereafter. If this were so held, it might boost the stock as being potentially "nontaxable" with great profit to those who may have arranged the proceeding. The holding of the State Tax Commission and the twice repeated opinion of Judge Stacy should be affirmed.

ALLEN, J., dissenting: I rest my dissent upon the following statement in the opinion of the Court: "We agree with the learned counsel that the Atlantic Coast Line Railroad Company of Virginia is a corporation

of the State of North Carolina, and that it was so decided in *Staton v. R. R.*, 144 N. C., 145, and affirmed in *R. R. v. Spencer*, 166 N. C., 522."

I agree that this is a correct statement of fact and law, and it is supported by *Cox v. R. R.*, 166 N. C., 652, in addition to the authorities cited.

The Court then holds that the stockholder must list his shares of stock for taxation because the corporation has not paid "a tax on its capital stock," and this position of the Court will of course be met if I can show that it is not necessary for the corporation to actually pay "a tax on its capital stock" in order that the stockholder may be exempt, or, if necessary, that the corporation has paid the tax.

Is it necessary for the corporation to pay in order that the stockholder may be relieved?

I think clearly not, because the corporation is required by law to list its capital stock and pay the taxes thereon, and if it does not do so, it is the duty of the taxing powers to make it pay, instead of trying to shift its burdens to the shoulders of the stockholders.

Does this corporation pay a tax on its capital stock?

It is alleged in the complaint and admitted in the answer that the Atlantic Coast Line Railroad Company of Virginia paid in this State in 1917 a license tax of $10 per mile for nine hundred miles; that the *ad valorem* value of the tangible assets of the company for 1917, as fixed by the State Tax Commission, was $15,891,335, and that of the franchise for that year as fixed by said commission was $18,754,010.

Note that the value of the franchise of said corporation as assessed by the State Tax Commission for taxation for the year 1917, which is the year for which the taxes in controversy in this action were assessed against the plaintiff, is admitted to be $18,754,010.

Does this valuation of the franchise include capital stock?

This is answered by the agreement of the parties filed in the record as follows:

"In this case it is agreed as follows:

"1. That under the Revenue Law and Machinery Act of 1917, in taxing railroad companies, the State Tax Commission, in making up the tax to be assessed against railroad companies, whether domestic or foreign, did not tax the capital stock of any railroad company except as such capital stock was embraced within the items mentioned in section 64 of the Machinery Act; that in assessing tax against railroad companies organized under the laws of this State, where such railroad companies were operated wholly within this State, the entire capital stock of the railroad company was embraced in and assessed as a part of the 'value of the franchise' as provided by section 64 (b) of the Machinery Act; that in assessing tax against domestic railroad companies, a part

of whose road is in this State and part in another State, the commission did not assess its capital stock other than as provided in section 64 (b), and only a part of its capital stock, as well as of its other property, was apportioned under section 65 of the Machinery Act of this State—'in proportion to the length the main line of such road in this State bore to the whole length of said main line'; and in assessing tax against a foreign railroad, part of whose road was in this State and part thereof in another State, the assessment against the capital stock of such road, as well as its other property, was made in identically the same way as the assessment was made against a domestic railroad company, a part of whose road was in this State and part in another State."

Three facts are settled by this agreement:

1. That in assessing tax against railroad companies organized under the laws of this State where such railroad companies were operated wholly within this State, the entire capital stock of the railroad company was embraced in and assessed as a part of the value of the franchise.

2. That in assessing tax against domestic railroad companies a part of whose road is in this State and a part in another State, a proportionate part of the capital stock was valued as a part of the franchise, the part so valued being in proportion to the length the main line of such road in this State bore the whole length of said main line.

3. That in assessing taxes against a foreign railroad a part of whose road was in this State and a part in another State, the assessment against the capital stock of such road was made in identically the same way as the assessment made against the domestic railroad company, a part of whose road was in this State and a part in another State.

It therefore appears as an admitted fact in this record that in the value of the franchise of the Atlantic Coast Line Railroad Company of Virginia, the State Tax Commission included the proportionate part of its capital stock in accordance with the terms of the legislative act, and that it has paid as other domestic corporations similarly situated.

Why then should not its stock have the same exemption granted to the stockholders of other corporations?

Particularly so when the Court says in its opinion that the Atlantic Coast Line Railroad Company of Virginia is a corporation of North Carolina, and the State Tax Commission says in its answer "that it has been the policy of the State of North Carolina for more than thirty years not to require to be listed the shares of stock held by residents of the State in corporations created by and chartered under the laws of the State."

It is not contended, and cannot be, that the language, "pay a tax on its capital stock," means on its entire capital stock, because in the same statute provision is made for the valuation of the capital stock of domes-

tic corporations, and that in assessing this value the value of the tangible property is deducted from the value of the capital stock so that no domestic corporation pays on its entire capital stock.

Again, in the same section quoted in the opinion of the Court, it is provided that foreign corporations must pay on its entire capital stock in order that the stockholder may be exempt, making the clear distinction that as to the domestic corporation the stockholder shall not pay a tax on his stock if the corporation pays a tax on its capital stock, but that the foreign corporation must pay on its entire capital stock in order for this exemption to prevail.

Whether this is an unlawful discrimination between foreign and domestic corporations is not now before us, and I do not express any opinion on it.

I submit that this demonstrates that the Atlantic Coast Line Railroad Company of Virginia is paying a tax on its capital stock just as other domestic corporations do, and if so, the shares of stock of the plaintiff are not liable to taxation.

It is insisted, however, notwithstanding the statement in the opinion, that there are two corporations, one domestic and the other foreign, and that the Atlantic Coast Line Railroad Company of Virginia, in which the plaintiff holds stock, and which is referred to as the parent corporation, and the North Carolina corporation as auxiliary, is the foreign corporation.

This renews the contest that has existed in this State since 1893, and which was regarded as settled by *Staton v. R. R., Spencer v. R. R.,* and *Cox v. R. R.,* the Court holding in each of these cases, in accordance with the contention of the State, that the corporation was domestic, unless we are willing to say that the same corporation is domestic when it is asking to exercise its privilege of removing its causes to the Federal Court for trial, and foreign when the State is endeavoring to collect taxes.

The history of legislation on this question goes back of 1899, and, if the present question is understood, it must be considered.

The parent corporation of the Atlantic Coast Line system was the Wilmington and Weldon Railroad, chartered by the General Assembly of North Carolina in 1834.

In 1893 the right of this corporation to exemption from taxation was challenged, and finally a settlement was reached, embodied in ch. 100, Private Laws 1893. At the same session the corporation was authorized to consolidate with other railroad companies, but, no action being taken under this statute, in 1899 the authority to consolidate was continued by ch. 105, Private Laws 1899, which contains this provision: "That any and all corporations consolidated, leased, or organized under the

provisions of this act shall be domestic corporations of North Carolina, and shall be subject to the jurisdiction thereof."

These several acts were referred to and discussed in *Cox v. R. R., supra,* and the Court adds: "It was under the authority of these several acts of the General Assembly that the Wilmington and Weldon Railroad became a part of the Atlantic Coast Line. It had its existence originally by reason of the legislative act of this State, and was therefore a creation of the State. It continued a domestic corporation of this State for more than sixty years, and prospered under our laws. It finally came to the State and said that it desired to enter into other business arrangements, and the State consented, but upon condition that the Wilmington and Weldon Railroad Company or the company taking over its property or with which it should be consolidated should continue to be liable in the courts of the State for wrongs done in the State, which condition was accepted and acted on by the company."

If the condition as to removal of causes prevails by consolidating under the act, why should not the same effect be given to the provision that "any and all corporations consolidated, leased, or organized under the provisions of this act shall be domestic corporations of North Carolina, and shall be subject to the jurisdiction thereof."

Again, in the *Staton case,* the Court says: "The statutes and public records show that the Wilmington and Weldon Railroad Company, a domestic corporation, has, by permission of the Legislature, become one of 'the constituent roads' in a line of consolidated railways extending through six States. In the consolidation are a large number of other 'constituent roads.' To say that each of these roads, chartered in six different States from Virginia to Alabama, have, by the consolidation, become citizens of the State of Virginia is rather startling. If this result, so far as the Wilmington and Weldon Railroad Company is concerned, has been accomplished by virtue of the power conferred by the Act of 1899, ch. 105, in defiance of the express provision in the statute that it should continue a domestic corporation, it would indicate an absence of power in the Legislature to guard the sovereign rights of the State in respect to corporations of its own creation. It would seem perfectly clear that a railroad corporation has no power to change its domicile. While the Legislature may permit a Virginia corporation to come into this State and consolidate with one of her own corporations, we cannot perceive how, in availing itself of such permission, the Virginia corporation may take the North Carolina corporation out of this State into Virginia, and so adopt it that the State, by virtue of whose laws it came into existence and continues to exist, loses jurisdiction of it for the purpose of bringing it into her courts to answer for wrongs done her own citizens. While we do not concede that such would be the

result of permission to consolidate, in the absence of restrictive words, certainly where, in the statute conferring the power to consolidate, it is expressly provided that the corporation, together with any corporations with which it should consolidate, should remain a domestic corporation, it would seem that such restriction would place the question beyond controversy."

I think it therefore appears that ch. 77, Laws 1899, is not the only statute relating to the matter; that the consolidation of the Atlantic Coast Line was under ch. 105, Private Laws 1899, and that the Wilmington and Weldon Railroad, a corporation chartered by North Carolina, with its offices and property in this State, was not permitted to enter into this consolidation except upon condition that the corporations associated with it should be North Carolina corporations.

The Virginia corporation became a part of the system upon this condition, and we have heretofore held it is bound by it, and in recognition of its obligation, it came to the State and asked that it be formally accepted as a North Carolina, which was done by ch. 77, Laws of 1899.

And in this last statute, which has been accepted, the corporation, whether foreign or not, has been domesticated for the purposes of taxation as it provides:

"Sec. 4. The powers given by this act to the Atlantic Coast Line Railroad Company of Virginia are granted upon the express condition that the property of the said Atlantic Coast Line Railroad Company of Virginia in this State shall always be liable to taxation under the Constitution and laws of this State, and that said company shall be subject to the tariffs, rules, and regulations prescribed by the board of railroad commissioners."

Acting under this statute and under the revenue laws of the State, the corporation is now paying a privilege tax of $9,000, and taxes on tangible property of the value of $15,891,335, and on its franchise, which includes capital stock according to the method of valuation adopted by the State, of $18,754,010, which is all the corporation would have to pay on present valuations, if conceded to be a domestic corporation.

If, therefore, the Atlantic Coast Line Company of Virginia is now paying a tax on its capital stock and other property, and if the State is collecting taxes from it as a domestic corporation, why should not its stockholders enjoy the same exemption accorded to the stockholders of other domestic corporations?

I concur fully in the proposition that it is for the Legislature to determine the subjects of taxation, and think under the facts in this record it has said the shares of the plaintiff shall not be taxed.

I attach no importance to the failure to provide in these acts for a capital stock or the issuing of stock, because this is not usual in acts of

consolidation, and if the corporations become North Carolina corporations by entering into the consolidation, they brought with them their capital stock.

I think it wise to adhere to our former decisions, and when we fail to do so we assume the attitude of holding that the same corporation is domestic when it is invoking the right of removal to the Federal Court, and foreign when the State wishes to impose a tax.

We also run the risk of losing the tax on the franchise of the corporation, valued at $18,754,010 (I do not say we will lose it), upon the ground that, being a foreign corporation engaged in interstate commerce, we can do no more than tax its property in this State, considered in connection with the use, and if such a result should be attained, the corporation can well afford to reimburse the stockholders on stock of the par value of $4,000,000. See *Gloucester Ferry case,* 114 U. S., 196; *P. & S., S. S. Co. v. Phila.,* 122 U. S., 344; *Postal Tel. Co. v. Adams,* 155 U. S., 688.

CITY OF RALEIGH v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 31 March, 1920.)

Parties— Damages— Pleadings— Demurrer— Cities and Towns— Ordinances—Bridges—Railroads.

In an action by a city to recover the extra cost of a bridge on its street across a railroad cut made necessary by the use thereof by a street railway company, the complaint alleged that the railroad company had built the bridge, and that under an existing ordinance each such company using the bridge should pay its proportionate cost, and demanded that it recover of the defendant street railway company the amount of the extra cost made necessary by its use of the bridge. *Held,* a demurrer was good on the ground that the railroad company, having built the bridge, evidently had paid the amount in suit, and therefore the city, the plaintiff in the action, could not recover it from defendant street railway company.

CIVIL ACTION, tried before *Guion, J.,* at the November Civil Term, 1919, of WAKE.

The court rendered judgment dismissing the action upon the pleadings. Plaintiff appealed.

The following is a copy of the complaint:

"The plaintiff, complaining of the defendant, alleges:

"1. That the plaintiff is a duly incorporated municipal corporation of the State of North Carolina.

"2. That the defendant is a corporation organized and existing and by virtue of the laws of the State of North Carolina, with its principal place of business in the city of Raleigh, N. C.

"3. That at the time hereinafter alleged, the defendant was engaged in the operation of a street railway in the city of Raleigh under a charter granted by said city.

"4. That at the time hereinafter alleged the Seaboard Air Line Railway was a corporation duly incorporated under the laws of Virginia, North Carolina, and other States, and was engaged in the operation of a line of railroad extending through the city of Raleigh.

"5. That in the construction of the Raleigh & Gaston Railroad Company, predecessor of the Seaboard Air Line Railway, it became necessary to construct a bridge at the point where Hillsboro Street in the city of Raleigh crossed the track of said Raleigh & Gaston Railroad Company, and said bridge was constructed of wood and was in existence at the time of the passage of the ordinance by the city of Raleigh hereinafter referred to.

"6. That the board of aldermen of the city of Raleigh on ..... July, 1912, enacted an ordinance requiring the Seaboard Air Line Railway to replace said wooden bridge with a steel or reinforced concrete bridge of design and plan to be approved by the board of Aldermen enacted the following sections:

" 'Sec. 14. That where in the city of Raleigh any bridge or bridges crossing any street at, above, or below street level, other than those bridges owned, built, and maintained wholly by the city of Raleigh, are built, replaced, repaired, remodeled, or renewed, and any company operating street cars or other modes of transportation by which cars are operated on fixed or stationary track or tracks laid in the streets of the city of Raleigh, and such track or tracks shall cross such bridge or bridges, then the person, firm, or corporation operating said street track shall join with the other parties building, replacing, repairing, remodeling, or maintaining such bridge or bridges, and shall pay its or their proportionate share of the cost of building, constructing, renewing, remodeling, repairing, or maintaining such bridge or bridges.

" '(a) That if any person, firm, or corporation operating street cars or other mode of transportation over fixed or laid track or tracks on the streets of Raleigh, whose said tracks shall cross any such bridge or bridges, shall refuse or for fifteen days fail to join with the other parties in building, constructing, renewing, repairing, or maintaining any such bridge or bridges, or to pay their proportionate cost of the same after having been requested in writing to join therein, then the person, firm, or corporation so failing or refusing to do shall be subject to a penalty of fifty dollars for every day or part thereof for which they refuse or

fail to join in the building, constructing, repairing, renewing, remodeling, or maintaining such bridge or bridges, and every day's failure or refusal to so join in the building, repairing, remodeling, or maintaining such bridge or bridges, shall be and constitute a separate and distinct offense.'

"7. That, as required by said ordinance, the Seaboard Air Line Railway, replaced the said wooden bridge with a bridge of reinforced concrete of a design and according to plans approved by the board of aldermen of the city of Raleigh, and the construction of said bridge was done in such manner and under the approval of the street commissioner of the city of Raleigh.

"8. Prior to the commencement of the construction of said bridge, the Carolina Power & Light Company, a corporation engaged in operating street cars on a stationary track across and upon said bridge, was requested to join in building the reinforced concrete bridge by which the wooden bridge was to be replaced, as required by the said ordinance of the city of Raleigh, and the said Carolina Power & Light Company refused, and for fifteen days failed to join with the Seaboard Air Line Railway in constructing said reinforced concrete bridge, and the said company refused to pay its proportionate part of the cost of same after having been requested in writing to join therein.

"9. That the construction of the reinforced concrete bridge to replace the wooden bridge was completed at a total cost of $12,496.21.

"10. That a bridge of the character required by the traffic on Hillsboro Street, other than the cars of the Carolina Power & Light Company, could have been constructed for the sum of $8,803.44.

"11. That the Carolina Power & Light Company's proportionate part of the cost of said bridge is $3,692.77, which is a sum equivalent to the difference in the cost of the bridge if it had been built of sufficient strength and size for ordinary traffic crossing said bridge, and the cost of the bridge when constructed of sufficient size and strength for use by the Carolina Power & Light Company in operating its cars across the same in safety.

"12. That prior to the commencement of this action the Carolina Power & Light Company was called upon to make payment of the said sum of $3,692.77, and has failed and refused to do so.

"Wherefore plaintiff demands judgment that it recover of the defendant, Carolina Power & Light Company, the sum of $3,692.77, with interest thereon from 29 January, 1914, until paid, and the costs of this action to be taxed by the clerk. JOHN W. HINSDALE, JR.,
Attorney for Plaintiff."

John W. Hinsdale, Jr., and Murray Allen for plaintiff.
James H. Pou and W. L. Currie for defendant.

BROWN, J. We agree with the counsel for the defendant that the complaint states no cause of action in behalf of the plaintiff against the defendant. The Seaboard Air Line Railway is no party to this action, and seeks no judgment against the defendant, and what rights it may have against the defendant is not for us to determine in this action.

It appears from the complaint that the Seaboard Air Line Railway replaced the wooden bridge over its tracks as they crossed Hillsboro Street with a bridge of reinforced concrete, approved by the defendant's authorities. It further appears that the construction of the said bridge cost the Seaboard Air Line Railway $12,496.21. The plaintiff demands judgment against the defendant for the sum of $3,692.77, which it is alleged is the proportionate part of the cost of said bridge which the defendant should pay. There is no allegation in the complaint that the plaintiff, the city of Raleigh, paid one penny for the erection of the said concrete bridge. Upon what theory the plaintiff can recover when it has paid out nothing we are unable to see. The entire complaint discloses clearly that the purpose of the action is to recover money of the defendant which was paid out by the Seaboard Air Line Railway Company.

We think the complaint fails to state a cause of action in behalf of the plaintiff, and that the action was properly dismissed.

Affirmed.

ACME MANUFACTURING COMPANY v. JONAH MCPHAIL.

(Filed 31 March, 1920.)

Appeal and Error— Instructions— Evidence— Vendor and Purchaser— Carriers of Goods—Freight Charges.

Where the evidence is conflicting as to whether the agent of the seller of fertilizers agreed to deliver them freight paid by him over a logging road beyond that of the common carrier by rail, and afterwards the seller's agent, before the goods were shipped, agreed with the purchaser by parole that the logging road freight charges would be paid by the seller, though not so specified in the original and written contract, and as to whether the seller's agent had the authority to make the parol agreement and as to whether the purchaser was notified, before shipment, of this want of the agent's authority and agreed to take the goods under the original written contract, and as to whether the agent had the authority to bind his principal by the parol agreement, *Quaere?;* and held that a charge that limited the inquiry to the mere making of the agreement between the agent and defendant as to the payment of the freight charges over the logging road, and ommitted to instruct upon the evidence relating to the purchaser's notice of the agent's limitation

of authority, before shipment, and of the defendant's waiver of the parol agreement and his ordering the shipment out of the goods under the original written agreement, is reversible error. Revisal, sec. 535.

CIVIL ACTION, tried before *Allen, J.*, and a jury, at September Term, 1919, of NEW HANOVER.

This suit was brought originally to recover damages for the conversion of certain collateral securities placed with the defendant for collection and alleged to have been converted by him, but it was agreed that it should be tried as one for the recovery of the sum of $145.47. This amount was composed of $18.34, admitted to be due, and the balance of $127.13, it being what the defendant alleged he had paid for freight charges of a logging road beyond Dunn, N. C., and which, as he contended, the plaintiff had promised to pay on the goods shipped by plaintiff to defendant. The parties had dealings, under a contract, and defendant purchased his fertilizer from the plaintiff, which, he alleged, had to be shipped to his home seventeen miles from a railroad, but on a logging road. Plaintiff alleged that the fertilizer was to be shipped, under the contract, only to Dunn, and there delivered f. o. b. Defendant contended that after the contract was executed, J. F. Woodward, the plaintiff's salesman, called on him and inquired why he had not sent in any orders for fertilizer under the contract, and he replied that he could not handle it, as the other dealers were paying the log road freight, and he could not come out even if he had to pay the log road freight charges, thereupon Woodward said: "We will pay the freight." There was evidence that Woodward had no authority to bind the plaintiff in this way. Relying on this promise, the defendant ordered the goods and paid the log road freight, as plaintiff would not pay it. There was evidence for the plaintiff that before McPhail had ordered out any goods he was notified by the plaintiff, through Mr. J. Gilchrist McCormick, that Woodward had no authority to promise him that the plaintiff would pay the log road freight charges on the goods shipped by the company to him, and that after he received this notice, he ordered the company to ship the goods. There was further evidence that afterwards the defendant signed three or four notes for certain amounts, being the balance due by him to the company, which was for the full amount demanded by the plaintiff, there being no deduction on account of log road freight charges, but defendant claimed that, by agreement, they were to be deducted from the amount of the notes.

The judge charged the jury as follows: "If Mr. Woodward told the defendant in a conversation about ordering out fertilizers during the year 1914 from the plaintiff, that the company had decided to allow the log road freight, and he did this to secure the order for the fertilizers,

having been told that the defendant was not going to order out any unless that freight was paid, as other companies were paying the log road freight—I say, if that was done—then that statement by the agent Woodward was a representation that would be within the scope of his authority that would be binding, whether he had the expressed authority to do it or not, if he did in fact do so. That would be so in the absence of any subsequent written agreement. Then the question would arise as to whether the company signed a written agreement which did not embody this agreement with the agent. If you find there was such an agreement would plaintiff still be bound by the agent's representation? That raises a very interesting question, but upon consideration I will charge you that in any event if you find from the evidence that plaintiff's agent, Woodward, agreed with the defendant that the company would pay the log road freight, and at that time there had not been any fertilizers ordered out, then, I charge you that the sale was then executory, and if you further find, relying upon that agreement, defendant McPhail ordered out fertilizers, I charge you that would be a subsequent oral agreement binding on the parties. And the question about the signing of a written agreement which did not embody it would be a circumstance which you can consider in saying whether there was such an agreement or not; because it is contended by the defendant that there was such an agreement made with Mr. Gilchrist as well as with Mr. Woodward, and the contention of the plaintiff is that there was no such agreement made with Mr. Gilchrist, and that the fact that he signed a written agreement which did not embody any such agreement is a circumstance from which you can infer that there was such an agreement. In other words, the plaintiff contends that if he had any such agreement with Mr. Gilchrist that when he came to sign the contract he would have embodied it in the contract.

"Mr. Wright: We do not claim there was a definite agreement with Mr. Gilchrist. He said there was a talk there, and he would let us know later.

"Court: I say he contends what amounts to an agreement or conversation about it from which the defendant insists that there was such an agreement with Mr. Woodward, and the plaintiff insists that according to the evidence there was no such agreement with Mr. Gilchrist, and there was no embodying of it in the contract, and, therefore, there must not have been any such agreement at all.

"I am stating that so you will get clearly in your mind that the controversy in this case hinges largely, if not entirely, upon the question as to whether there was any such agreement as to this log road freight, and what I am doing now is stating to you the arguments and contentions

of the parties and it is for you to consider these contentions and say whether the defendant is indebted in the sum of $145, and some cents or only in the sum of $18 and some cents.

"You may take the case.

"Judge Rountree: Your Honor, call their attention to the fact that we contend the signing of the note was evidence of the fact that there was no such agreement.

"Court: When I said note I meant signing of the contract and note also.

"Jury returns for further information.

"Court: I understand that you wish some information, and I want to make the inquiry, is it some one of the jury who wants it, or is it the whole jury?

"Juror: The entire jury. We differ on your charge as to the authority of the statement that Mr. Woodward made to the defendant. Some claim you said if he made that statement that the company was liable for that statement, and some think you didn't make that statement.

"Court: I charged you they would be liable if Mr. Woodward made the agreement with him.

"Juror: Regardless of the written contract previously made?

"Court: I said they could take the written contract and note in consideration in saying whether Woodward made the agreement or not, they claiming he didn't make any such agreement. The defendant says he did make such an agreement, and you will take all the circumstances in consideration in saying whether he did make such an agreement, and if he did, then I charge you they would be bound by it.

Plaintiff duly excepted to the charge. Verdict for the defendant, and judgment thereon; plaintiff appealed.

WALKER, J., after stating the case as above: We will consider only one question. It appears that, after the agreement between Woodward and defendant was made, as alleged by the latter, and conceding, for the sake of argument, that it was made, the company notified defendant, through J. G. McCormick, that Woodward had no authority to make the agreement, and this was done before the defendant had ordered any of the goods. It was an important and material fact in the case if the jury found from the evidence that this notice was given. We said in *Wynn v. Grant,* 166 N. C., 47: "The principal is held to be liable upon a contract duly made by the agent with a third person: (1) when the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority. The term 'apparent

authority' includes the power to do whatever is necessary to be done in order to carry into effect the principal power conferred upon the agent to transact the business or to effect the commission which has been intrusted to him." *Brimmer v. Brimmer,* 174 N. C., 435, 439.

Under this doctrine, even though Woodward did make the agreement with the defendant about the log road freight charges, it is contended that if, before the defendant acted thereon, he received notice of the agent's lack of authority, the agreement would have no effect upon the principal or make him liable for the unauthorized act of his agent, because up to the time of the notice that he had exceeded his authority, the defendant had done nothing, under the Woodward agreement, which would injure or prejudice him, if the authority of the agent is denied, or the agreement is held to be invalid, because of the want of authority in Woodward to make it. But we do not rest our decision on that ground, or decide that question. The judge's charge confined the jury to the single inquiry, whether or not the agreement was made, and the finding upon that question was held to be determinative of the defendant's liability. In thus instructing the jury, we think the court narrowed the investigation too much. There was another question involved, which should have been considered, and that is whether the defendant, after being notified by Mr. McCormick, if he was so notified, of Woodward's lack of authority to make the agreement and bind the company, consented that he should, the Acme Company should, forward the fertilizers under the written contract, and that the defendant would pay the log road freight. There was ample evidence of this understanding introduced by the plaintiff and supplemented by the defendant's acts and conduct. Mr. McCormick testified that the notice of Woodward's assumption of authority not conferred on him by the company, and of its unwillingness to pay the freight, was given to defendant, and after this was done, the defendant sent in orders for the fertilizers, and also signed the notes for the amount due for the same without any allowance or credit for the freight charges paid by him. We do not mean that these are the admitted facts, because the evidence in regard to them was conflicting, the defendant denying the notice and explaining his signing of the notes by stating that they were to be credited with the amount of the freight charges. But this conflict of evidence required the matter to be submitted to the jury to find the facts in regard to it. If the jury should find that defendant had agreed to order under the old contract, and not claim credit for the freight charges, the liability of defendant would not depend solely upon the making of the contract with Woodward. The charge therefore was erroneous in that respect, as it excluded from consideration the other important evidence in the case bearing upon the essential inquiry whether defendant had waived, or surren-

dered, all rights under the Woodward agreement, if he had any, and agreed to go back to the original contract and pay the freight charges. The two propositions were so closely connected and related as to be inseparable. The fault in the instruction was in making the case turn upon one fact, and ignoring all other matter just as essential to a decision. The judge substantially charged the jury that, if the agreement with Woodward was made, the verdict should be for the defendant, and if not made, then for the plaintiff, thereby eliminating other evidence having an important bearing upon the question of liability for the log road freight charges.

In *S. v. Merrick,* 171 N. C., at 795, *Justice Hoke* says: "The authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. Charged with the duty of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds, and made imperative with us by statute law. Rev., 535: 'He shall state in a plain and correct manner the evidence in the case, and explain the law arising thereon,' and a failure to do so, when properly presented, shall be held for error. When a judge has done this, charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but, as stated, on the substantive features of the case arising on the evidence, the judge is required to give a correct charge concerning it." Citing *Simmons v. Davenport,* 140 N. C., 407; *S. v. Foster,* 130 N. C., 666, and other authorities.

It was held in *Simmons v. Davenport, supra:* "The rule which requires that a complaining party should ask for specific instructions if he desires a case to be presented to the jury by the court in any particular view does not, of course, dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon. Rev., 535." To the same effect are *Carleton v. State,* 43 Neb., 373, and *State v. Barham,* 82 Mo., 67, cited and quoted from in the *Merrick case.*

It was, therefore, the duty of the court to have broadened the charge so as to embrace the material portions of the evidence, with proper explanation of the law arising thereon. This was not done, and constituted error, which entitles the plaintiff to another jury.

New trial.

C. F. FARRALL v. UNIVERSAL GARAGE COMPANY, INC.

(Filed 31 March, 1920.)

1. **Negligence—Evidence—Nonsuit—Trials—Automobiles—Garage.**

Where the action is to recover damages to the plaintiff's automobile left with others in the defendant's public garage, and taken out by defendant's employees, but at night after his working hours, and injured, based upon the allegation that the defendant, at the time, was negligent in not properly safeguarding the garage, where the automobiles of others were kept, and there was evidence that the garage did not have an inner gate and the machine was taken when the watchman or another employee in charge had gone upstairs to close some windows; *Held*, a motion as of nonsuit upon the evidence was properly overruled.

2. **Negligence—Evidence—Subsequent Acts—Garage—Automobiles—Appeal and Error—Prejudicial Error—Trials.**

In an action by the owner of an automobile against the keeper of a public garage for not properly safeguarding machines left by the public therein, so that the automobile was taken out at night by a third person and injured, there was evidence that, at the time, the garage did not have an inner gate. *Held*, it was reversible error to admit evidence over the defendant's objection, that since then he had put in an inner gate, as such precaution would not be an admission of responsibility and would tend to create a prejudice in the minds of the jury; and does not fall within the exceptions to the rule as laid down in *Pearson v. Clay County*, 162 N. C., 224, and other like decisions.

3. **Negligence—Measure of Damages—Cost of Repairs—Automobiles.**

Where the owner of an automobile brings action to recover damages of the owner of a public garage for negligently allowing his machine to be taken therefrom by a third person and injured, the measure of damages is the difference in the value of the machine before and after the occurrence, and not alone the expense necessary to put the machine back in the same condition, as nearly as possible, as it was in before it was injured, though the cost and expense of the repairs may be considered as evidence, in proper instances.

APPEAL by defendant from *Calvert, J.*, at the October Term, 1919, of CUMBERLAND.

This is an action to recover damages for injury to an automobile.

It was admitted that the plaintiff was the owner of the automobile, and that he had left it at the garage of the defendant to be taken care of for hire.

The plaintiff introduced evidence tending to prove that the automobile was taken from the garage at night without his consent by one Lee, who was in the employment of the defendant, and that it was damaged; that at the time it was taken from the garage there were automobiles in the garage, including his own, of the value of about $50,000; that the doors of the garage were open, and that there was no one present to protect them.

The defendant introduced evidence tending to prove that while Lee was in the employment of the defendant, his working hours were over at six o'clock, and that the automobile was taken from the garage between eleven and twelve o'clock; that David McLaurin was in charge of the garage on the night the automobile was taken; that about eleven o'clock Lee came to the garage and asked permission to use the automobile of the plaintiff, and that McLaurin told him he could not use it unless the plaintiff gave his permission to do so over the phone or by written order; that Lee then left, and about three-quarters of an hour thereafter McLaurin left the front of the garage temporarily for the purpose of going to the second story of the garage to close some windows, and that while thus temporarily absent he heard a noise indicating that some one was starting an automobile; that he ran down as quickly as he could and found Lee leaving with the automobile of the plaintiff, and that he remonstrated with him but could not stop him.

On the cross-examination of this witness it was shown by the plaintiff that there was no inner gate at the garage at the time the automobile was taken therefrom.

This witness was thereafter recalled by the plaintiff for further cross-examination as follows:

Q. Have you got an inner gate there in that garage now? A. Yes, sir.

Q. And it was put there since this happened? A. About four months after this happened.

Q. But it was put there since this happened? A. Yes, sir.

Q. And you keep it locked all the time after dark? A. No, sir.

Q. Except when cars are out? A. No, sir.

Q. You lock it at night? A. Yes, sir; when I go home.

In apt time the defendant objected to each and every one of the questions asked this witness, and the replies made by the witness thereto; objection overruled, and defendant excepted.

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was refused, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

John H. Cook and Cook & Cook for plaintiff.
Sinclair & Dye for defendant.

ALLEN, J. There would be much force in the defendant's motion for judgment of nonsuit if the plaintiff was seeking to recover damages on account of the negligence of Lee, because he took the automobile after his working hours were over, and there is good reason for urging that at that time he was not in the employment of the defendant, but this is not the ground of the plaintiff's action.

He is demanding damages, not for the negligence of Lee, but for the negligence of the defendant itself in leaving the automobile unprotected, with the doors open and no one in charge, so that any one passing could take it, and that his automobile was taken and damaged by reason of the failure of the defendant to exercise ordinary care, and on this phase of the case we are of opinion there is evidence for the consideration of the jury.

There is, however, an exception which entitles the defendant to a new trial, and that is to the admission of evidence that since the injury complained of the defendant has made changes in the premises by erecting inner gates at the garage.

A leading case on this subject is *Hawthorne v. R. R.,* 144 U. S., 202, in which the Court says:

"Upon this question there has been some difference of opinion in the courts of the several States; but it is now settled, upon much consideration, by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent because the taking of such precaution against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.

"The true rule and the reasons for it were well expressed in *Morse v. Railway Co.,* above cited, in which *Mr. Justice Mitchell,* delivering the unanimous opinion of the Supreme Court of Minnesota, after referring to earlier opinions of the same Court the other way, said: 'But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this Court is on principle wrong; not for the reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so; and it would be unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretion upon human conduct, and virtually holds out an inducement for continued negligence.' 30 Minn., 465, 468.

"The same rule appears to be well settled in England. In a case in which it was affirmed by the Court of Exchequer, *Baron Bramwell* said: 'People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before.' *Hart v. Railway,* 21 Law T. (N. S.), 261, 263."

This authority is cited and the excerpts quoted approved in *McMillan v. R. R.,* 172 N. C., 855, and the same doctrine is declared in *Lowe v. Elliott,* 109 N. C., 582; *Myers v. Lumber Co.,* 129 N. C., 252; *Aiken v. Mfg. Co.,* 146 N. C., 328, and in other cases.

It is true there are exceptions to the rule, illustrated by *Blevins v. Cotton Mills,* 150 N. C., 493; *Tise v. Thomasville,* 151 N. C., 281; *Boggs v. Mining Co.,* 162 N. C., 394; *Pearson v. Clay County,* 162 N. C., 224, where such evidence is admitted to show that the plaintiff's injury was brought about in the way claimed by him, or on the question as to whose duty it was to make repairs, when this was in controversy, or to show conditions existent at the time of the injury, or in contradiction of a witness, but the evidence admitted here is not within any of the exceptions.

The defendant introduced McLaurin, its manager, who testified on cross-examination that there was no inner gate when the automobile was taken from the garage, and he was afterwards recalled by the plaintiff for further cross-examination, and it was then that he was permitted to testify over the objection of the defendant that inner gates were erected at the garage about four months after the injury complained of.

This latter evidence did not tend to show that the plaintiff was injured in the way he claimed or conditions existing at the time of the injury, because the witness had already testified that there were no inner gates at the garage at the time of the injury, nor was the question as to whose duty it was to make repairs raised, and it had no tendency to contradict any statement made by any witness for the plaintiff or the defendant.

The evidence was important because it enabled the plaintiff to urge before the jury that the defendant, by erecting the inner gates, had in effect admitted that the precautions of the defendant at the time the automobile was taken were insufficient, and that they had negligently failed to erect a barrier which would have prevented the taking of the automobile.

There is also an exception in the record to that part of the charge on the issue of damages in which his Honor instructed the jury that the

measure of damages was the expense necessary to put the automobile in the same condition as near as possible as it was before it was injured.

The correct and safe rule is the difference between the value of the machine before and after its injury, and in estimating this difference it is proper for the jury to consider the cost and expenses of repairs and in some instances this may be the damage which a party may be entitled to recover, but in this case the cost of repairs might be more or less, and it is better to adhere to the well settled rule.

For the error pointed out there must be a

New trial.

W. G. CROOM v. J. G. MURPHY.

(Filed 31 March, 1920.)

Abatement—Actions—Wrongful Death—Physicians—Surgeons.

An action for damages will not lie against a surgeon by a parent, for the instantaneous death of a child alleged to have been caused by the negligence of the surgeon and his assistant in not watching and giving the proper attention to the child while administering an anesthetic for an operation, the right of action abating with its death.

APPEAL by plaintiff from *Allen, J.*, at the September Term, 1920, of NEW HANOVER.

This is an appeal from a judgment sustaining a demurrer to the complaint and dismissing the action.

The plaintiffs are parents of Mildred Croom, who, as alleged in the complaint, "died suddenly on an operating table," while undergoing an operation by the defendant, a physician and surgeon.

It is alleged that in performing the operation the defendant was assisted by a nurse, who administered ether, and the allegations of negligence and damages are as follows:

8. That the death of the said Mildred Croom was caused by the negligence of the defendant, or his agents, in that:

1. That defendant failed to make the proper and necessary examination of the physical condition of the said Mildred Croom before said ether was to be administered to her.

2. In permitting and allowing said nurse, who was incompetent for that purpose, to administer ether to the said Mildred Croom.

3. The careless and negligent acts of said nurse, acting as the agent of and under the direction and control of defendant in administering too much ether to the said Mildred Croom or in administering the same in a careless and unskilled manner.

4. In the failure of the defendant, and defendant's agents, to observe the physical condition of the said Mildred Croom as indicated by her pulse and other symptoms while the said ether was being administered, and while she was under the influence of the same, and that one or the other, or all of the above acts of negligence, was the proximate cause of the death of the said Mildred Croom.

5. That by reason of the death of the said Mildred Croom, through the negligence of the defendant as above alleged, that these plaintiffs, the parents of the said Mildred Croom, did suffer and do still suffer great mental anguish, all of which these plaintiffs have been damaged, to wit, in the sum of ten thousand ($10,000) dollars.

The demurrer is chiefly on the ground that the death of Mildred Croom being sudden and instantaneous, no action can be maintained by the plaintiffs or by any one else except by an administrator.

McClammy & Burgwin for plaintiff.
Wright & Stevens and Carr, Poisson & Dickson for defendant.

ALLEN, J. The cause of action is the wrongful death of Mildred Croom, and the allegation of mental anguish is only important upon the issue of damages, and the authorities in this country and in England are practically uniform that the action cannot be maintained.

"At common law the right of action for an injury to the person abates upon the death of the party injured, the case falling within the familiar rule, *'actio personalis moritur cum persona.'* Hence, where death results, whether instantaneously or not, from such an injury, no action can be maintained by the personal representatives of the party injured to recover damages suffered by the decedent.

"In cases of injury to the person, however, in addition to the right of action of the party receiving the physical injury, causes of action may accrue to persons who stand to him or her in the relation of master, parent, or husband for the recovery of damages for the loss of service or society. To these persons the rule of *'actio personalis moritur cum persona'* has no application. It might naturally be supposed, therefore, that damages should be recovered by persons of this description, not only for the loss of service or society before the death, but also for the permanent loss of service or society, caused by the death. It might perhaps be supposed that the law would even grant a remedy, as is done by the Scotch law, to the children and to other members of the family of the deceased who might have suffered injury by his death, irrespective of any technical loss of service or of society; but to both classes alike the common law denies a remedy." Death by Wrongful Act, Tiffany (2 ed.), ch. 1, sec. 1.

"The scope of the rule being that no action can be maintained for causing death, the rule does not preclude an action to recover damages for loss of service of the injured party during the period between the injury and the death, although the death resulted directly from the injury. Thus, in *Baker v. Bolton, Lord Ellenborough* told the jury that they could take into consideration the loss of the wife's society, and the distress of mind the plaintiff had suffered on her account, from the time of the accident until the moment of her dissolution; and this distinction has been followed." Death by Wrongful Act, Tiffany (2 ed.), ch. 1, sec. 17.

"The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in English courts, and in many of the State courts, and no deliberate, well considered decision to the contrary is to be found." *Ins. Co. v. Brame,* 95 U. S., 756.

The same question has been decided many times in this State, two of the most important of these decisions in reference to the question now presented being *Killian v. R. R.,* 128 N. C., 261, in which it was held that the father could not maintain an action for the services of his son who was killed, and *Gurley v. Power Co.,* 172 N. C., 694, in which this doctrine was approved, and the Court says: "An action for the recovery of wages of a minor or for injury to him lies in favor of the parent; but if the child dies from the injury the action abates. The only action that lies in such case, in this State, is for wrongful death, as authorized by Rev., 59, and that embraces everything. In such action the value of the life before 21, as well as after 21 years of age, is recoverable. No other action lies than this. *Killian v. R. R.,* 128 N. C., 262. In *Davis v. R. R.,* 136 N. C., 115, the subject is again discussed, the Court holding: 'An action may be maintained by an administrator for the death of an infant by the wrongful act of another.' This case was reviewed and reaffirmed in *Carter v. R. R.,* 138 N. C., 750."

In *Bailey v. Long,* 172 N. C., 661, and *Bailey v. Long,* 175 N. C., 687, the cases relied on by the plaintiff, the death was not instantaneous, and this distinguishes them from the present case.

The judgment must be

Affirmed.

J. W. AND R. E. MOORE v. WILLIAM MILLER.

(Filed 31 March, 1920.)

1. Ejectment—Land—Titles—Deeds and Conveyances—Evidence—Nonsuit—Statutes.

In an action involving title to lands the plaintiff must recover on the strength of his own title, and he must show title of the State by a grant from the State directly to himself, or connect himself with one by proper deeds or he must show possession and the assertion of ownership, with or without color, for the requisite period, or that the defendant is estopped to deny his title, and where he has not shown any grant from the State or possession in himself or those under whom he claims, or any facts creating an estoppel in his favor, but only a line of deeds beginning in 1895 covering a larger tract of land and his possession, with assertion of ownership, of a smaller tract included therein, he has failed in his proof, and a judgment as of nonsuit upon the evidence is properly entered against him. Revisal, sec. 539.

2. Title—Lands—Presumptions—Possession—Statutes.

The statutory presumption as to possession and occupation of land in favor of the true owner, Revisal, sec. 386, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title," and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership.

3. Same—State's Title—Burden of Proof—Evidence.

Our statute, Revisal, ch. 195, providing "That in all actions affecting title to real property title shall be conclusively presumed to be out of the State, unless the State be a party to the action or the trial is one of a protested entry laid for the purpose of obtaining a grant," etc., does not create a presumption in favor of either party to the action falling with out the exception, and does not relieve a litigant seeking to recover the land of showing the legal title in himself.

4. Same—Nonsuit—Judgments—Affirmative Findings.

While in ejectment the plaintiff must recover upon the strength of his own title, though the title is conclusively presumed to be out of the State, and for the lack of evidence of his legal title a motion to nonsuit thereon is proper under Revisal, sec. 385, that the action be dismissed, it is error for the judgment to incorporate an adjudication in defendant's favor as to his title, as such is only permissible on affirmative findings sufficient to justify it.

CIVIL ACTION, tried before *Calvert, J.*, and a jury, at October Term, 1919, of CUMBERLAND.

The action is to recover a tract of land claimed by plaintiff on allegation that defendant is in the wrongful possession of a portion of said land.

Defendant alleged that he owned and was in possession of twenty-two and six-tenths acres of land in said county, setting forth boundaries, and denied that his occupation and possession of said lands is wrongful.

On the hearing, plaintiff introduced a connected line of deed, the first bearing date in 1895, for 185 acres of land in said county describing same by metes and bounds, and the last bearing date in October, 1918, purporting to convey said tract of land to plaintiffs. Plaintiff's evidence, in connection with the admissions in the pleadings, further tended to show that defendant is in possession of twenty-two and six-tenths acres of land, with definite boundaries, the land claimed by him in his answer, and the same lying and being with the larger boundary set forth in plaintiff's deeds.

Plaintiff having rested, defendant demurred to the evidence and moved for judgment of nonsuit, under the Hinsdale Act, Rev., 539. The court sustained the demurrer, and entered judgment that plaintiffs are not the owners of the land described in defendant's answer, but that defendant is the owner of said land and entitled to retain possession thereof. Plaintiff excepted and appealed.

Nimocks & Nimocks for plaintiffs.
John H. Cook and Cook & Cook for defendant.

HOKE, J. The authoritative cases have not infrequently expressed approval of the position that in actions of ejectment plaintiff must recover on the strength of his own title. The various methods by which this requirement can be met are specifically set forth in *Prevatt v. Harrelson,* 132 N. C., 250-251; *Mobley v. Griffin,* 104 N. C., 112-115, and other decisions on the subject as follows:

"1. He may offer a connected chain of title or a grant direct from the State to himself.

"2. Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought. *Graham v. Houston,* 15 N. C., 232; *Christenbury v. King,* 85 N. C., 229; *Osborne v. Johnston,* 65 N. C., 22.

"3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself, and those under whom he claims, for seven years before the action was brought. *Blair v. Miller,* 13 N. C., 407; *Christenbury v. King, supra; Isler v. Dewey,* 84 N. C., 345.

"4. He may show, as against the State, possession under known and visible boundaries, for thirty years, or, as against individuals, for twenty years, before the action was brought. Sections 139 and 144, Code of North Carolina.

"5. He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. Code, sec. 147; *Conwell v. Mann,* 100 N. C., 234; *Melvin v. Waddell,* 75 N. C., 361.

"6. He may connect the defendant with a common source of title, and show in himself a better title from that source."

From a perusal of this statement it will appear, as held in *Graybeal v. Davis,* 95 N. C., 508, that, in order for plaintiff to establish his title, he must show:

1. A grant from the State directly to himself or connect himself with one by proper deeds or he must show possession in the assertion of ownership, with or without color, for the requisite period, or that defendant is estopped to deny his title.

Recurring to the testimony, the plaintiff has failed to show title in any of the ways indicated in these decisions. He has not shown any grant from the State. Nor has he offered any evidence of possession in himself or those under whom he claims. Nor presented any facts creating an estoppel in his favor. He has shown merely a line of deeds, beginning in 1895, covering a tract of land of 185 acres, and that defendant is in present possession of a portion of said land asserting ownership, and, on authority, this will not suffice. *Honeycutt v. Brooks,* 116 N. C., 788; *Brown v. Morisey,* 128 N. C., 139; *Worth v. Simmons,* 121 N. C., 357. We were referred by counsel to Rev., 386, establishing certain presumptions as to possession and occupation of land in favor of the true owner, but these presumptions, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title." Unless and until this is made to appear, the presumption is primarily in favor of the occupant, to wit, that he is in possession, asserting ownership, a distinction pointed out in *Land Co. v. Floyd,* 167 N. C., 686-687. Nor does the recent act of the Legislature, as to "the presumption of title being out of the State in actions affecting the title to real property" in any way affect the question presented. The statute referred to, Laws 1917, ch. 195, provides: "That in all actions affecting the title to real property title shall be conclusively deemed to be out of the State of North Carolina unless the State be a party to the action or the trial is one of a protested entry laid for the purpose of obtaining a grant," etc.

It is well recognized that, in actions of this character, a litigant on whom rested the burden of the issue, suing for a small piece of land, with

a view only of showing title out of the State, was called on to establish the location of some old grant, often of much larger boundary. Ancient of date, with the witnesses who could speak directly to the facts dead, many of the marks and monuments of boundary destroyed or obliterated, it was an effort entailing much cost and expense, and not infrequently threatening a miscarriage of justice, and this when it was fully understood that, if a *prima facie* case was established and the adversary required to offer proof, he too would insist on the position that title was out of the State.

To remove this burdensome and untoward condition, the Legislature has enacted this most desirable statute providing that, in actions between individual litigants, title should be conclusively presumed to be out of the State. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. While we approve of his Honor's ruling on the principal question, there is error in so much of the decree as adjudges that the title is in the defendant. Under our decisions, that is only permissible on affirmative findings sufficient to justify it. *Cavenaugh v. Jarman,* 164 N. C., 372; *Wicker v. Jones,* 159 N. C., 103-116.

On the facts presented, the case having been determined on motion of defendant and for entire lack of proof on the part of plaintiff, the case seems to come directly under the Hinsdale Act, Rev., 539, calling for "judgment as of nonsuit," usually taking the form that the action be dismissed. In the heading, the section referred to embodying the Hinsdale Act, purports to regulate procedure, "one a demurrer to the evidence" and in the absence of a jury verdict or a specific and formal admission of the relevant facts, authority is in support of a judgment "as of nonsuit." *Tussey v. Owen,* 147 N. C., 335; *Purnell v. R. R.,* 122 N. C., 832-836.

There is no error in the ruling of the lower court, and, modified as suggested, the judgment is affirmed.

Modified and affirmed.

W. C. CARDEN v. SONS AND DAUGHTERS OF LIBERTY.

(Filed 31 March, 1920.)

1. Insurance, Life—Arrears in Dues—Notice—Forfeiture—Matters of Defense—Evidence—Nonsuit—Trials.

Where the insurer admits in an action on a life insurance policy, its liability, unless, as it contends, the insured was not in good standing

for failure to pay the last assessment before her death, and it was contended by the plaintiff that this would not work a forfeiture because of the failure of the defendant in its duty to give notice of arrears in dues, *Held*, the matters to avoid liability were for the defendant to prove, and any negligence in failing to give the required notice by the officers of the company being negligence of the defendant, a motion as of nonsuit upon evidence of this character was properly denied.

2. Evidence—Mail—Presumptions—Rebuttal—Questions for Jury—Trials.

Where notice to the insured of arrears in dues is necessary to work a forfeiture of a policy of life insurance the mailing of such notice properly addressed is presumptive evidence of its delivery, but it is for the jury to determine, upon the evidence, whether this presumption has been rebutted.

APPEAL by defendant from *Stacy, J.*, at September Term, 1919, of DURHAM.

The plaintiff's wife had been a member of the defendant, a fraternal organization, for more than 8 years, paying her dues for said period. Upon her death the plaintiff brought this action for $300 benefits under her contract with said organization. The defendant admits that the plaintiff's wife was a member of said organization at her death, but alleges that she was in arrears in the sum of $2.50 for nonpayment of assessments, and therefore was not "in good standing" and not entitled to recover. The court submitted issues to the jury, who found that the plaintiff's intestate, Nettie Carden, was a member in good standing of Branson Council, No. 9, at the time of her death, and that defendant was indebted to the plaintiff in the sum of $297.50. From judgment thereon the defendant appealed.

J. W. Barbee and R. O. Everett for plaintiff.
D. W. Sorrell and Bryant & Brogden for defendant.

CLARK, C. J. The defendant admitted that if Nettie Carden, the plaintiff's wife, was a member of the defendant organization in good standing at the time of her death it would be liable in the sum of $300, but contended that she was in bad standing at the date of her death because she owed $2.50 dues at the date of her death. The plaintiff contended that though she owed the defendant $2.50 at her death, this would not work a forfeiture for the reason that she had never been notified of her arrears by the defendant, as it was its duty to do.

The refusal of the motion to nonsuit requires no discussion, for this was a matter of defense, and the burden was upon the defendant. *Spruill v. Ins. Co.*, 120 N. C., 141, and citations thereto in Anno. Ed.; Rev., p. 400.

Whether Nettie Carden received the notice, either in person or by an agent, was entirely a question of fact for the jury, who found in favor of the plaintiff, and it is not for this Court to review the evidence. The by-laws required the notice of assessments to be sent members by the lodge officers. It must be shown that this requirement was complied with and the member did not lose her good standing unless this was done. If the failure to send such notice was the negligence of the local agent or financial secretary, such default did not fall upon the member, and while the amount which the jury found to be thus due ($2.50) still remained a debt to be discharged by the member, which the jury has allowed as a credit on the $300, it did not place her out of the position of being in good standing. *Doggett v. Golden Cross,* 126 N. C., 486; *Duffy v. Ins. Co.,* 142 N. C., 106; *Lyons v. Grand Lodge,* 172 N. C., 410.

The financial secretary of the lodge, witness for the defendant, testified that it was his duty "to notify each member who was in arrears of the amount due." He testified that Mrs. Carden was paid in full up to 1 July, and that the only notice he sent her after that date in writing was sent by his little daughter on 14 October to be mailed at the mail box in East Durham, where she lived, but, on cross-examination, he said that he knew at the time that she and her husband were both ill with the "flu," and in the hospital at West Durham, three miles distant. He also says that he had a conversation with the husband on 31 August in regard to an arrearage. It is admitted that Mrs. Carden died on 16 October, two days after the alleged mailing of the notice, and the plaintiff testified that she did not receive that notice. He further testified that the notice to him personally on 31 August was about another arrearage, which he communicated to his wife, and that she paid it promptly on 2 September. It appeared that there were other arrearages at times previous to 1 July, but that all these had been paid. The judge charged the jury that if the notice was mailed there was a presumption of delivery, and that if the wife received it the plaintiff could not recover.

The deposit of the notice in the mail, if made, is *prima facie* evidence of the receipt thereof by the sendee, but the jury, upon the evidence, evidently found that this was rebutted in this case. This action was brought by the plaintiff as beneficiary in the contract.

No error.

THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, v. PIEDMONT RAILWAY AND ELECTRIC COMPANY.

(Filed 31 March, 1920.)

1. Insurance—Policies—Contracts—Interpretation.

The meaning of a policy of indemnity is ascertained by interpreting the entire writing, or from the policy considered as a whole.

2. Insurance—Employer and Employee—Master and Servant—Policies—Contracts—Indemnity—Interpretation.

A policy of employer's indemnity insurance based on the premium to be paid as a certain per cent of the payroll of the employees, at certain locations, described the work covered by the policy as "electric light and power companies, operation, maintenance and extension of lines and making service connections," and it was understood and agreed that the policy should not apply to bodily injuries or death caused directly or indirectly by reason of the operation or maintenance of the street railway or its power line or any other work in connection with the street railway or railway power lines, with the further provision, "no work of any nature, not herein disclosed, is done by the assured at the places covered hereby, except the operation of street railways which is not covered hereunder." *Held*, the policy included everything except the operation of street railway, and with that exception, the premium due by the assured is based upon the full payroll.

3. Insurance — Policies— Indemnity— Caption—"Operation"— Interpretation.

A policy of employer's indemnity insurance, issued to an electrical corporation giving the location for the work to be done describes the work covered by the insurance as "Operation, maintenance and extension of lines and making of service connections," *Held*, the word "operation" was not used as a mere caption or heading that included only "maintenance and extension of the lines and making service connections," but is itself one of the things to be insured, as if the policy had used the words "the operation of the line as well as maintenance and extension, including the making of service connections."

4. Contracts—Insurance—Policies—Prior Negotiations—Merger—Equity—Corrections.

All previous negotiations leading up to the execution of the written policy of insurance indemnifying the employer against loss, merge into the contract as written, and upon its acceptance by the assured it is conclusively presumed to contain all the terms of the agreement for insurance by which the parties intended to be bound, unless or until reformed in equity for fraud, mistake, etc.

5. Insurance—Policies—Contracts—Ambiguity—Interpretation.

The insured is entitled to a favorable interpretation of his policy when there is any ambiguity in its language.

CIVIL ACTION, tried before *Calvert, J.*, at January Term, 1920, of ALAMANCE.

Plaintiff, on or about 29 June, 1915, issued and delivered to the defendant, Piedmont Railway and Electric Company, a public liability insurance policy, set out in the record.

The premium to be paid for this liability insurance was nine dollars ($9) per each one hundred dollars ($100) of compensation of said defendant to its employees working at and in the places covered by said insurance, as per its three monthly payrolls. Plaintiff sues for a balance alleged to be due on the premium, and alleges that this three monthly payrolls amounted to five thousand forty-two dollars and forty-five cents ($5,042.45), exclusive of the payroll of the employees of said street railway company, which was specifically excluded because injuries to persons occurring by reason of the operation of the street railway were not covered by the policy.

Defendant does not in terms deny the plaintiff allegation as to the amount of the payroll, but does deny that the payroll of defendant's power plant and light plant, which is run in connection with the power plant, should be included in the payroll on which the premium is based. It was agreed that if the payroll of the power plant is included defendant would owe plaintiff two hundred twenty-two dollars and ninety cents ($222.90), and that if said part of defendant's payroll is not included defendant would owe plaintiff nothing. The parts of the policy itself material to the controversy are as follows:

"The premium is based upon the entire compensation earned, during the policy period, by all employees of the assured not herein elsewhere specifically excluded, engaged in connection with the work described in and covered by this policy."

"4. A full description of the work covered by this policy, the locations of all places where such work is to be done, the estimated compensation of employees engaged therein for the term of this policy, the premium rate or rates and the deposit premium, are given hereunder:

"Description of work covered by this policy: Electric light and power companies, operation, maintenance, and extension of lines, and making service connections.

"Locations of all places where such work is to be done: Alamance and Orange counties, North Carolina.

"Estimated compensation for policy period: See three-monthly premium adjustment endorsement.

"Premium rate per $100 of commission: $9.

"Deposit premium: .....

"It is understood and agreed this policy shall not apply to bodily injuries or death caused directly or indirectly by reason of the operation or maintenance of the street railway, or its power lines or any other work in connection with the street railway or railway power lines."

(Then follows statement of special work done at all locations mentioned in policy, which are not covered by it, unless a specific amount of compensation; premium rate and deposit are stipulated for.)

"8. No work of any nature not herein disclosed is done by the assured at the places covered hereby, except as follows: Operation of street railway not covered hereunder."

The plaintiff contended that it was entitled to a premium which should be arrived at by taking a percentage of the entire payroll of the defendant.

The defendant contended that the premium was to be a percentage of only a part of its payroll, and was not to include the payroll of its employees engaged where the public was forbidden to go, and where there would be no danger of injury to the public, to wit: The payroll of its employees actually engaged in and about its power house.

If the contention of the plaintiff is correct, then the defendant would be due the balance sued for.

If the contention of the defendant is correct, then it has paid plaintiff all sums due.

The trial judge, upon the admitted facts and other evidence which was not disputed, found for the defendant, and found that the defendant had paid all premiums it had contracted to pay, and there was a verdict and judgment for the defendant.

Plaintiff excepted and appealed.

W. S. Coulter and A. H. King for plaintiff.
John J. Henderson and Parker & Long for defendant.

WALKER, J., after stating the facts as above: We are required, in construing this policy, to examine the entire writing and to base our conclusion as to its meaning upon the contract as a whole. The language of the instrument is very comprehensive, and, when properly construed, it embraces all kinds of work and operation and all risks arising therefrom, except those in connection with the defendant's street railway, or its power lines. If the exception was intended to cover other operations or other risks, why was it not expressed in the writing. The language of the exception is very clear and explicit, for it provides that, "No work of any nature, not herein disclosed, is done by the assured at the places covered hereby, except the operation of street railway, which is not covered hereunder." That states, without the shadow of a doubt, that the policy of insurance includes everything except the operation of the street railway, otherwise it would have been added in unmistakable language that there was a further exception in regard to the operation of the light and power plant. How this construction can be avoided, under

the rule of law prescribed for ascertaining the meaning of a written contract, we are at a loss to know. The language of the exception is an unerring index to the meaning of the instrument, as it eliminates the *only* thing not insured, and leaves all that is left to be covered by the policy.

Again, section 4 of the "statement" shows what was intended with respect to the risk assured by the plaintiff, and for which the defendant promised to pay the premium as fixed by the contract by the formula set forth therein. It describes the "work" covered by the insurance as "operation, maintenance, and extension of lines, and making of service connections." The word "operation," in that paragraph, was not used as a mere caption or heading that included only "maintenance," and extension of lines, and making service connections, but is itself one of the things intended to be insured, as if it had been expressed, "The operation of the lines as well as the maintenance and extension, including the making of service connections." It was something separate and apart from the other things specified, and not a general or descriptive title in relation to them. This expression, "Operation, maintenance and extension," etc., immediately follows these words in the policy: "A full description of the work covered herein, and the location of all places where such work is to be done, etc., are given hereunder"; so that everything is included except "operation or maintenance of the street railway or the power lines or any other work in connection therewith." There are other reasons which lead us to the same conclusion, that the defendant is liable for the remainder of the premium, claimed by the plaintiff. There is a general rule as to contracts that all prior regulations or agreements are merged in a subsequent written contract touching the same subject-matter, which is now too well established to need the support of cited authority. Therefore, when a policy of insurance, properly executed, is offered by the insurer and accepted by the insured as the evidence of their contract, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound. If any previous agreement of the parties shall be omitted from the policy, or any terms not theretofore considered added to it, the parties are necessarily presumed to have adopted the contract as written as the final form of their binding agreement. This was said in *Clements v. Ins. Co.*, 155 N. C., 57, and is well supported by Vance on Insurance, p. 348, cited and approved by us in that case. What, therefore, passed between the parties prior to the delivery of the policy must be taken by us as abandoned at that time, and the policy substituted for it, as the later and final expression of their agreement. It is to be presumed that the defendant read the policy before accepting it, and that the terms stated therein were satisfactory.

It was said in *Ins. Co. v. Mowry,* 96 U. S., 547, by *Justice Fields:* "The entire engagement of the parties, with all the conditions upon which its fulfillment could be obtained, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions were omitted, the parties could have had recourse, for a correction of the agreement, to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected, the policy must be taken as expressing the final understanding of the assured, and of the insurance company." This was approved in *Floars v. Ins. Co.,* 144 N. C., 232; *Wilson v. Ins. Co.,* 155 N. C., 173; *Clements v. Ins. Co., supra.*

The doctrine is well stated, as to all contracts, and especially with reference to policies of insurance, in 9 Cyc., 391, as follows: "Where one accepts a paper which he knows contains the terms of an offer, he will be bound by it, and cannot be heard to say that he did not read it or did not know what it contained. This principle finds frequent application in bills of lading, express receipts, and the like. So where a person receives an insurance policy pursuant to an application, it is his duty to examine it and see those things in respect thereto which are open to ordinary observation by a person of ordinary intelligence, and if he neglects to do so, taking it for granted that what he has received is what he applied for or intended to apply for, such conduct on his part amounts to an acceptance of the policy received, regardless of whether it corresponds to the policy applied for or intended to have been applied for or not, and if it does not so correspond he cannot be heard to complain."

If the defendant desired the policy to be drawn differently, it should have made this known before it was accepted, and rejected the policy unless its wish was complied with. Besides, defendant was retaining a policy, which offered larger protection to it than was claimed, and if any accident had occurred in the operation of the light or power lines, for which it was liable in damages by reason of its negligence, or for other cause, it could have claimed indemnity, and this being so, why should it not pay the corresponding premium. It would seem to be equitably estopped by this fact, though this is immaterial and is not decided. Defendant could have asked for a liberal construction of this policy in its favor and the solution of any doubt as to the meaning of these clauses against the insurance company. We have held that the insured is entitled to a favorable interpretation, when there is any ambiguity in the language of a policy. *Bray v. Ins. Co.,* 139 N. C., 390; *Power Co. v. Casualty Co.,* 153 N. C., 275; Vance on Insurance, 429.

Such a claim for construction surely would have been sustained by us, and the present defendant would have secured a benefit thereby for which it would owe the plaintiff the premium now claimed by it. So

that defendant had a policy for full insurance, excepting the railway operation, and it must, therefore, pay the premium thereon as fixed by the rules of the company.

It follows that in any view the court erred in its decision.

New trial.

CLAUDE ETHERIDGE v. EAGLES-HOUSE REALTY COMPANY.

(Filed 7 April, 1920.)

Wills—Devise—Estates —"Issue"— Children—Correlative Terms—Deeds and Conveyances—Fee Simple Title.

The intention of the testator as gathered from the terms of the will control as to whether the word "issue" shall mean "children" and slight indications thereof may be sufficient to show his intention that they should have a correlative meaning; and where the devisee was a child of the testator and the disposition of other lands to his other children indicates that he meant "children" by the word "issue," that meaning will be given; and a devise to testator's daughter M. during her natural life and after her death, to her issue and her heirs, the deed of M. and her children, assuming that she will not thereafter have other children, will convey a fee simple title to their grantee.

CONTROVERSY without action, tried by *Lyon, J.*, at March Term, 1920, of EDGECOMBE.

There was judgment for the plaintiff, and the defendant appealed.

W. O. Howard for plaintiff.

H. G. Connor, Jr., for defendant.

BROWN, J. This is an action for the construction of the words "her issue" in the devise to Maud S. Bullock in item three of the Arch Braswell will, the words of the devise being as follows: "To have and to hold unto the said Maud S. during her natural life, and after her death to her issue and their heirs."

The said Maud S. is about 65 years of age, and has two children, Ernest Bullock and Maud S. Bullock, who were born prior to death of testator, and the said Ernest Bullock has two children who are minors. Maud S. Bullock and her children, Ernest Bullock, and wife, and Maude Bullock, conveyed the land devised to plaintiff, who contracted to convey the same to defendant, and the question for determination is whether plaintiff can convey a good title provided the said Maud S. Bullock shall have no other child or children born unto her, and this depends upon

the meaning of the words "her issue," that is, whether it means her children, or her lineal descendants.

Waving the contingency of further children born to Maud S. Bullock, which is waived by the defendant, we are of opinion that a deed made by the said Maude S. Bullock and her children conveys a good title to the defendant for the land purchased. There are authorities that the word issue, when used in a will and unexplained by the context, may mean descendants, but in this, as in all other cases involving the construction of wills, the intention of the testator governs.

Where it is held to mean descendants, it is held to mean children upon a slight indication in other parts of the will that such was the intention of the testator. *Ford v. McBrayer,* 171 N. C., 424; *Palmer v. Horn.* 84 N. Y., 516; 2 Jarman Wills, 635.

In *Faison v. Odom,* 144 N. C., 108, a devise "for the use and benefit of my son Edward during his life, and after the death of my son Edward to his issue forever, in case of his death without leaving issue, I give, devise, and bequeath unto his surviving brothers and their heirs, and in case of their death before him and leaving children, to such issue and their heirs"; it is held that the word "issue" here means children from the construction placed on the word by the testator himself, "such issue" being a correlative term for children.

In this case we think it is manifest that the testator in using the words "her issue" meant the children of Maud S. Bullock. He devised his lands to his children, W. T. Braswell, J. C. Braswell, Mary E. Braswell, and Arch Braswell in fee, to W. T. Braswell in trust for Jas. W. for his natural life, and then to his *children* to be conveyed to them when the youngest becomes 21 years of age; and to Maud S., Helen Adrienna, and Alice Lee Joyner "during her natural life, and then to her issue." In Item 5 of the will, the devise to Alice Lee Joyner was in same terms as the devise to Maude S. Bullock in Item 3. Before the death of the testator, he sold the land devised to Mrs. Joyner and made a codicil, appointing a trustee to hold the money and directed that the income thereof be paid to her for life, and then to be equally divided between her *children.*

It seems from an examination of the several items of the will, which it is unnecessary to set out, that the testator uses the words issue and children as synonymous terms. The word issue is construed to mean children in *Palmer v. Dunham,* 125 N. Y., 68; *Brishin v. Huntington,* 5 Eng. Ann. Cases, 931. In that case it is held where the issue is to take the share of a deceased parent the word is construed to mean the children of such parent. See, also, *Cochrain v. Schnell,* 140 N. Y., 516; *King v. Savage,* 121 Mass., 302; *Parkhurst v. Harrower.* 142 Pa., 432.

Affirmed.

PLANTERS BANK AND TRUST COMPANY v. TOWN OF LUMBERTON.

(Filed 7 April, 1920.)

1. Taxation—Situs—Personal Property—Statutes—Legislative Powers—Courts.

It is for the legislature to determine the *situs* of personal property for purposes of taxation, and it may provide different rules for different kinds of property, change them from time to time, and the courts may not, for considerations of expediency, disregard the legislative will.

2. Same—Banks and Banking—Shares of Stock.

The Machinery Act of 1919, ch. 92, changes the policy of the State as declared in ch. 234, sec. 42, Laws of 1917, as to the listing shares of bank stock by the holders where they reside, and fixing the *situs* of the shares for taxation for the purpose of county schools and municipal taxation at the residence of the owner, by omitting entirely the requirements of the Act of 1917 that the owner of the shares shall list them at the place of his residence, and by imposing this duty on the cashier of the bank, requiring him to pay the State, county, special and municipal taxes, the intent of the statute being to require the bank to pay all taxes on the shares of its stock where it is located, and to relieve the owner from listing or paying them, except as he may be required to reimburse the bank.

APPEAL by plaintiff from *Allen, J.*, at the January Term, 1920, of ROBESON.

This action was instituted upon an agreed statement of facts, to determine the right of the defendant, town of Lumberton, to levy and collect, for municipal purposes, a tax upon the shares of stock of the plaintiff banks owned by the nonresidents of the town of Lumberton, but residents of the State of North Carolina. All of the plaintiff banks have paid, under protest, to the defendant town of Lumberton the taxes assessed by said defendant against the shares of their capital stock owned by nonresidents of the town of Lumberton, but residents of the State of North Carolina, and this action is brought on the part of the plaintiff banks, and their stockholders, who are nonresidents of the town of Lumberton, but residents of the State of North Carolina, to recover the tax so paid under protest.

Judgment was rendered denying the right of the plaintiffs to recover, and they excepted and appealed.

Johnson & Johnson, L. R. Varser, and H. E. Stacy for plaintiffs.
McIntyre, Lawrence & Proctor for defendant.

ALLEN, J. The determination of the *situs* of personal property for purposes of taxation is addressed to the General Assembly, which may

provide different rules for different kinds of property, and change them from time to time, and when it has acted no consideration of expediency will authorize the courts to disregard the legislative will. *Winston v. Salem,* 131 N. C., 405.

"The capital stock of a corporation is assessable to the corporation itself at its principal place of business. But shares of such stock, considered as the property of their individual holders, are taxable to such holders at their respective places of residence, in the absence of a statute to the contrary; but the *situs* of shares of corporate stock for purposes of taxation may properly be fixed by statute at the place where the corporation is domiciled." 37 Cyc., 961.

The question, then, presented by the appeal is whether the Legislature has said that shares of stock in banking corporations, located in Lumberton, held by persons residing in North Carolina but outside of the corporate limits of Lumberton, shall be subject to taxation as other personal property in that town.

Prior to the Machinery Act of 1919, ch. 92, the policy of the State as declared in ch. 234, sec. 42, Laws 1917, required the banking institution to pay the State tax upon the shares of stock, and owners of the shares to pay the county and municipal taxes thereon, the provision as to the latter being, "The residents of this State who are shareholders in any bank, banking association, or savings institution (whether State or National) shall list the number of their respective shares in the county, city, or town, precinct, or village where they reside, for the purposes of county, school, and municipal taxation," thus fixing the *situs* of the shares for the purpose of county school and municipal taxation at the residence of the owner.

The act of 1917 was, however, changed in important particulars by ch. 92, sec. 42, Laws of 1919, the material parts of which are as follows:

"The taxes imposed for State purposes upon the shares of stock in any bank, banking association, or savings institution (whether State or National) in this State shall be paid by the cashier of such bank, banking association, or savings institution, directly to the State Treasurer. . . . Every such bank, banking association, or savings institution shall, during the month of May, list annually with the State Tax Commission, in the name of and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its market value on the first day of May, or, etc. . . . The taxes so assessed upon the shares of any such bank, company, or association shall be paid by the cashier, secretary, treasurer, or proper accounting officer thereof, and in the same manner and at the same time as other taxes are required to be paid in such county, special school district, or city; in default of such payment such cashier, secretary, treasurer, or other accounting

officer, as well as such bank, company, or association shall be liable for such taxes, and, in addition, for a sum equal to ten per centum thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the bank, company, association, or officer paying them, or may be deducted from the dividends accruing on such shares. The taxation of shares of any such bank, banking association, or savings institution shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of this State, whether such taxation is for State, county, school, or municipal purposes."

This last statute of 1919 is controlling in the present controversy, and while it does not in express language change the *situs* of the shares of stock from the residence of the owner to the home of the bank, this is the only reasonable inference from its provisions.

It omits entirely the requirement in the act of 1917 that the owner of the shares shall list them at the place of his residence, or at any other place, and imposes this duty on the cashier of the bank, who is required to pay the taxes, State, county, special, and municipal.

The purpose of the act is clear to require the bank to pay all taxes on the shares of stock where it is located, and to relieve the owner from listing or paying taxes thereon, except as he may be required to reimburse the bank.

Affirmed.

SOUTHERN EXPRESS COMPANY, ET AL. v. J. B. PRITCHETT.

(Filed 7 April, 1920.)

Principal and Agent—Landlord and Tenant—Lessor and Lessee—Trusts.

Where the managing agent of a corporation conducting its business in leased premises, obtains a renewal of the lease from the owners in his own name, the lessor and the corporation, both believing he was acting only as agent in procuring the lease, he will be held, as a matter of law, trustee thereof for his principal.

APPEAL by defendant from *McElroy, J.*, at November Term, 1919, of FORSYTH.

Swink, Korner & Hutchins and Manly, Hendren & Womble for plaintiff.

J. E. Alexander and D. C. Kirby for defendant.

CLARK, C. J. The Southern Express Company was occupying an office in Winston under a lease for 5 years from 1 April, 1911. Soon

after the expiration of the 5-year term, the defendant, who was managing agent of the express company at that point, had a conversation with one of the owners of the property about renewing the lease, who said it made no special difference, that the matter could run on and whenever the express company wanted a lease it could get it. On 28 February, 1917, the defendant was notified by the express company that it desired to renew the lease for another year, from 1 April, 1917, and he was instructed to see the owners as to this. The defendant saw the owners and reported to the express company that the owners were willing that the express company should continue renting the premises as theretofore, but the rent would probably be increased to $75 per month. On 26 November, 1917, the defendant, while still managing agent of the express company at Winston, decided to leave their service, and on 1 December, took a lease in his own name for one year from 1 December, 1917, with the privilege of four years more at the same rental for the premises then occupied by the express company.

It appears from the testimony of Mr. C. E. Bennett, one of the owners, that he thought the defendant was acting for the express company, and that the lease he agreed to was in the name of the express company, and that he would not have leased it to the defendant if he had known that he was trying to lease the premises for himself. Two other witnesses testified that the defendant told them in conversation that Bennett, the owner, was not aware that the defendant was leasing the property for himself, and one of them said the defendant further stated: "If Mr. Bennett had been aware that he (the defendant) was trying to lease it for himself he would not have gotten it." The defendant being recalled, admitted the above conversations except the last statement.

The court properly charged the jury on the first issue, that if they believed the evidence, the defendant, on 26 November, 1917, at the time he took a lease of the premises for himself, was managing agent of the express company at Winston, and as such agent acquired knowledge with respect to the occupancy of the premises by means of which he secured the lease to himself.

The court further correctly charged the jury, as to the second issue, that the Southern Express Company, on 26 November, 1917, was occupying the premises in question as a tenant by the year beginning 1 April, 1917, *Murrill v. Palmer,* 164 N. C., 50, and directed the jury to answer that issue "Yes."

The court also correctly charged the jury upon the third issue that if they believed the evidence it was the purpose of the express company not to vacate the premises in question until they had completed arrangements to obtain other quarters, and they had not done so when the defendant leased these premises.

The fourth and last issue, and which is really the only controverted question, was "Does the defendant hold the said lease in trust for the plaintiff express company, as alleged in the complaint?" The court, upon this issue, charged the jury: "The court is of the opinion, gentlemen of the jury, and so charges you, that if the defendant, while acting as agent of the plaintiff express company at this place, and while actually occupying this building, either for a term of one year, or from month to month, and with knowledge of these facts, went to the Messrs. Bennett (the owners they thinking he was acting for his employer, the express company) and secured a lease from them in his own name and for his own benefit, that then, under those circumstances and conditions, he would, at the option of the plaintiff express company, hold the lease as trustee for its benefit." The jury found this issue "Yes." There is ample evidence to justify this finding of fact, and the instruction as to the law was correct.

This case presents really only one issue of fact, and there is very little controversy as to that. As a matter of law, it is clear that the charge of the court upon the fourth issue was correct. It was a breach of good faith for the defendant, as the jury found, while occupying the premises as agent for the express company, and during their tenancy, without their knowledge, and without the knowledge of the owners, to secure a lease in his own name, the owners thinking that they were renewing the lease to the express company. Such conduct cannot be sustained in a court of law.

There were other exceptions, but none of them require any discussion. No error.

J. S. CAMPBELL v. MARY J. CAMPBELL.

(Filed 7 April, 1920.)

1. Summons— Process— Service— Publication—Pleadings—Extension of Time—Implication—Statutes.

Under the "Crisp Act" (sec. 1, ch 304, Laws 1919) to "restore the provisions of the Code of Civil Procedure in regard to Process and Pleadings and to expedite and reduce the cost of litigation," where advertisement of the summons is required, by implication the time for filing answer is extended to twenty days after the completion of the service by publication; and where this time has not been allowed before judgment, it is an irregularity upon the face of the record which entitles the defendant to have it set aside.

2. Same—Divorce.

The provision of Revisal 1564, putting in a denial of the plaintiff's allegations in an action for divorce, does not affect the defendant's right to

twenty days after completion of the service of summons by publication, in which to answer or demur, etc.

3. Judgments, Set Aside—Irregularities—Meritorious Defense—Findings —Appeal and Error.

The denial by the statute of the plaintiff's allegations in an action for divorce, Revisal 1564, presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action.

APPEAL by plaintiff from *McElroy, J.*, at August Term, 1919, of SURRY.

This was a motion, heard before *McElroy, J.*, at October Term, 1919, of SURRY, to set aside a judgment, rendered August Term, 1919, granting an absolute divorce to the plaintiff, upon the ground of surprise and irregularity. The motion was allowed, and plaintiff appealed.

J. H. Folger, R. C. Freeman, and Carter & Carter for plaintiff.
Graves & Graves and W. L. Reece for defendant.

CLARK, C. J. The summons was issued 21 July, returnable 8 August, before the clerk, under the provisions of Laws 1919, ch. 304 (the "Crisp Act"): "To restore the provisions of the Code of Civil Procedure in regard to process and pleadings, and to expedite, and reduce the cost of litigation." The defendant being out of the State, service was ordered to be made by publication. The time required for publication terminated 23 August, 1919.

As section 1 of said act provides that the summons shall be made returnable before the clerk "at a date named therein, not less than 10 days, nor more than 20 days from the issuance of said writ," and service by publication not having been completed on 8 August, the time was necessarily extended by operation of law till the expiration of the four successive publications required by statute to perfect service. The complaint was filed 21 July, and publication being completed by 23 August, the defendant was entitled to 20 days thereafter to answer or demur.

This is the clear meaning and intent of this statute, and was so held by *Walker, J.*, in *Lumber Co. v. Arnold, ante* 269. We repeat it, as the profession is desirous of a construction of the statute, wherever there is any possibility of a doubt.

The defendant being entitled to 20 days from 23 August in which to answer or demur, the case could not stand for trial at the term of court beginning 25 August, unless the defendant had waived it by an appearance, or by filing a demurrer or answer.

This was an irregularity upon the face of the record, and the judgment was properly set aside on that ground. We may say that exactly the

same proceeding should be followed where there is an attachment issued and publication thereof as the basis of service. Such publication requiring a longer time than the twenty days specified for the return of the summons before the clerk, as a matter in due course, the cause stands over until the publication is completed, after which date the defendant is entitled to 20 days, if he so elect, in which to file his answer or demurrer unless he shall raise an issue by filing a demurrer or answer within less time.

The plaintiff in this case insists that, this being an action for divorce, the law puts in a denial, and therefore the defendant was not entitled to "20 days in which to answer or demur." We do not so understand the law. Rev., 1564, provides: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of plaintiff on any such complaint until such facts have been found by a jury." The object of this statute was to prevent judgment being taken by default, or by collusion, and to require the facts to be found by a jury. It certainly was not intended thereby to deprive the defendant of the right given to every other defendant of 20 days in which to file complaint or answer. If at the end of such 20 days no answer or demurrer is on file, the plaintiff is entitled to judgment by default final, or by default and inquiry, as the case may be, in all other actions, but in divorce cases if no answer or demurrer is filed within 20 days the law provides that the complaint is nevertheless deemed denied, and its material allegation must be proven to the satisfaction of the jury.

Within the 20 days the defendant may file an answer going beyond the bare legal denial presumed by law, for she may set up affirmative defenses such as invalidity of marriage, justification, condonation, connivance, recrimination, and statute of limitations. 14 Cyc., 671.

Under the original Code of Procedure, adopted in 1868, the intention was to simplify and expedite the trial of causes and to reduce the expense of legal proceedings, the most marked features of this new procedure probably were:

1. The abolition of the distinction between law and equity, and between forms of actions, and to provide that there should be only one form of action. Const., Art. IV, sec. 1.

2. The other striking feature of the new procedure was that all summonses should be returnable before the clerk, and that all pleadings should be made up and perfected before him; that when an issue of law is raised an appeal should lie to the judge at chambers, and be promptly acted on by him and returned. And further, that when an issue of fact arose upon the pleadings, and in such cases only, the cause

should be transferred to be tried before the judge at term. This eliminated very much delay and expense in legal proceedings, for no cases could be on the docket before the judge at term for trial except those in which issues of fact had been formulated before the clerk by the pleadings.

This system has been continued in all the States, unchanged, in which the new procedure had been adopted, it is believed, except in this State. In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of actions there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly, what was commonly known as the "Batchelor Act," entitled, "An act suspending the Code of Civil Procedure in certain cases," ch. 76, Laws 1868-9, ratified 22 March, 1869, was enacted, which provided that summonses should be made returnable to the term instead of before the clerk. This act provided, sec. 13, that the suspending act should be temporary and in force only "until 1 January, 1871." But, owing to the financial conditions of the time, it was later continued indefinitely, and then by oversight, though contradictory to the concept and intent of the Code of Civil Procedure (which required all process to be issued returnable before the clerk), it has endured to this time though such anomaly has not obtained, it is believed, in any other State.

The suspending act was discussed in *McAdoo v. Benbow,* 63 N. C., 461, there being a dissent upon the ground that the act was unconstitutional. The statute of 1919, ch. 304, known as the "Crisp Act," was intended, as expressed in its title, simply "To restore the provisions of the Code of Civil Procedure in regard to process and pleadings, and to expedite, and reduce the cost of, litigation." The suspending act was an anomaly grafted upon the simple and expeditious system of the Code of Civil Procedure, as it was originally adopted here, and as it has continued to prevail in all the other States that adopted it. Such suspension was intended, as stated in the act, to be temporary.

The motion to set aside the judgment was made upon the ground of surprise, and also for irregularity. But the latter ground being sufficient, the other defect need not be discussed, and indeed seems not to have been considered by the judge.

It is true that in a proceeding to set aside a judgment, either for irregularity or excusable neglect, the mover must show that it has a meritorious defense. *Miller v. Curl,* 162 N. C., 1; *Currie v. Mining Co.,* 157 N. C., 209; *Scott v. Life Asso.,* 137 N. C., 516. But that does not apply as to an action for divorce, for it is presumed as a matter of law that there is a meritorious defense, and the facts must be found by a jury under proceedings that are regular on their face.

Affirmed.

D. W. SPRY, SR., ADMINISTRATOR OF D. W. SPRY, JR., v. E. L. KISER, PLEASANT GRIFFIN, AND DR. S. S. FLYNT, TRADING AS E. L. KISER COMPANY.

(Filed 7 April, 1920.)

1. Evidence—Nonsuit—Trials.

Upon a judgment of nonsuit upon the evidence the appellant is entitled to have it considered as true and construed most favorably for him, giving him the benefit of every inference that may reasonably be drawn therefrom.

2. Same—Druggists—Negligence—Damages.

Evidence that a druggist was asked for, and guaranteed that he had given his customer, pure sweet oil, for an infant who had theretofore beneficially been given sweet oil to keep it in a good, healthy condition, and that it was made violently sick, with vomiting and severe bowel trouble, upon taking the usual sized dose of the oil in question; that it recovered somewhat and was again made violently ill at the second dose, which continued until its death about twelve days afterwards; that the oil received from the druggist was rancid, and not sweet oil, and would probably produce the sickness causing the death of the infant, *Held*, sufficient for the determination of the jury as to whether the druggist negligently supplied the rancid oil, and that it caused the death of the infant, in an action against the druggist to recover damages for its wrongful death.

CIVIL ACTION, tried before *McElroy, J.*, and a jury, at November Term, 1919, of FORSYTH.

Plaintiff alleged that his intestate's death was caused by the negligence of the defendants in selling him rancid and unwholesome oil to be administered to the intestate during his last illness.

J. W. Newsom testified substantially: He is the maternal grandfather of the child, had taken it into his household when it was but a few months old to be nursed and reared, its mother, who was plaintiff's daughter, having died at its birth. The child became ill, and its physician prescribed the use of sweet oil in stated doses. This oil, which they had on hand, seemed to work well, and plaintiff went to the defendant's drug store to get more oil, and called for sweet oil. He was handed a bottle, for which he paid, and after it was given to the child the latter became suddenly very ill during the night, and continued so until morning, having had 26 evacuations of the bowels, and did not recover, but languished and died about 12 days afterwards. The child constantly retched and tried to vomit. He was quite sick the next morning, but was more quiet late in the evening, and the doctor advised that another dose of sweet oil be given, and plaintiff gave the child another dose from the same bottle. When the doctor came the second time, plaintiff asked him to smell the bottle, which he did, and said, "That is stale, rancid,

and out of date. I know what to fight now; that is the cause of it." He asked for whiskey and brandy was brought to him, and he said that will not do in this case. Whiskey was then given to the child. The doctor then told the witness to take the bottle of rancid oil back and tell Mr. Griffin "to send a bottle of pure sweet oil, that is olive oil." I told him I wanted olive oil. He then said to me that he knew that was cottonseed oil when I bought from him before. The witness replied: "The doctor says that is what is the cause of the child's sickness, and if that kills the baby Mr. Spry is going to law you." Griffin then said: "He can't hurt us as we did not make it." Witness then said to him: "Mr. Griffin, suppose the State chemist comes around here and finds it, what would you say?" Griffin replied, "I would say we kept it to grease automobiles," and witness said, "Yes; and to kill babies." Dr. Flynt, the attending physician, stated that "the child was as well developed as any he had ever handled, his pulse never had varied one item." He said this about one hour before the child died. The witness, J. W. Newsom, testified further: "He was taken sick on the night of 18 July, 1916. We had been giving him sweet oil twice a week up until this time; gave it to him Tuesday night and Friday night; that was simply to make him sleep well and keep his bowels open; he had shown no signs of sickness at this time. After the supply of sweet oil that they brought to the house with the baby gave out I bought sweet oil from E. L. Kiser; I bought five cents worth at the time so it would not get old. On 18 July I applied to E. L. Kiser & Company for a bottle of sweet oil; I thought they were out of oil on the evening of 18 July, and I went to the store and asked Mr. Francis Kiger if he had any more of that sweet oil; Francis Kiger was a clerk in E. L. Kiser's store, and had been for something like a year. He said he had no more 5-cent packages, but had plenty of 10-cent packages. I said, 'That's all right, if it is pure and all right.' He said, 'It is pure sweet oil; I will guarantee it.' I bought it. The bottle shown me is what I bought from him on that occasion. I carried it on home and gave the child not quite a teaspoonful like I had been giving him. That was nine o'clock, and I took the little fellow and went to bed, and I always took a bottle of milk and my wife a bottle, and at eleven o'clock he had vomited all over the bed, and was looking for the bottle. I nursed him to the bottle and he went off to sleep again, and about one o'clock he woke me again hunting for his bottle; I nursed him again and he had vomited again and discharged all over the bed, and I woke up my wife, at one o'clock on the morning of the 19th, and from then to day he had 26 actions and vomited continually until the doctor got there. I didn't notice anything else in his condition at that time; his bowels kept moving all night as fast as we could attend to him until the doctor got there. In a day or two after

that his mouth turned red like he had been eating pickled beets, and that lasted about a day and night, and then commenced coming a white scum in his mouth; that lasted a day or two and that went away, but he never did stop his vomiting." . . . "The baby had full front teeth, four above and four below, at four months old, and the doctor said he never heard of that or read of that before. We had four different doctors with the child; I told them to spare no expense or money, because I wanted to save the baby. The baby grew worse all the time, heaving and trying to vomit, and discharging; his mouth had peeled off; about the fourth or fifth day his mouth peeled off that white scum, and then there was running water from his mouth all the time, like a child slobbering. That kept up steady until he died, and when he died he was perfectly black all around his abdomen and his lips. I went up to Rural Hall the evening after the child was buried. Mr. Kiser, a member of the firm of E. L. Kiser & Company, spoke to me and said, 'D. W. is dead.' I said, 'Yes.' He said, 'Well, poor little sickly thing; he could never be raised nohow.' I said, 'Don't talk that. Ask Dr. Flynt.' Dr. Flynt was present and he cleared up his throat and said, 'You are mistaken, Mr. Kiser; that was the best developed baby I ever handled, and I have handled quite a few,' something along that line." . . .

"Dr. Spears came to my house one Sunday and asked me to let him go through the analysis of that oil. He read the analysis, and he said, 'God damn it, no wonder the baby died.' My wife heard him say that. I never told him I was going to bring suit; I might have told him Mr. Spry might bring suit." Other physicians were called in to see the child, but failed to stop the progress of the illness which resulted in its death on 1 August, 1916, when it was 6 months and 18 days old, having been born on 13 January, 1916. There was evidence that the child had been nourished with Horlick's Malted Milk, and perhaps other food, and had been stimulated with small doses of whiskey. He had been in good health and was a vigorous child until given the rancid oil, which almost immediately made him sick in the manner described.

Mrs. Tesh testified as follows: "I was living in Winston in 1916. I remember the death of Mrs. D. W. Spry, formerly Miss Nannie Newsome. I lived just about half a block from her. About three or four weeks after she died I took the baby. Mrs. Brewer had charge of the baby before I got it. He was nearly three months old when I carried him to his grandfather's, who lived at Rural Hall then. The baby was a little sick when I first took him; I thought he was hungry; I didn't have any doctor with him; I fed him little more than he had been getting, and he got along just fine; he never was sick at all while he was with me. He was a normal, healthy, good-sized child for his age at the time I turned him over to Mr. Newsome. I gave him sweet oil,

castor oil, and little baby medicines I always used with my own children. I told Mr. Newsome when I carried the baby there what I had done for it. I gave it oil more as a preventative than a cure. I think I saw the child three times after I carried it to Mr. Newsome's; went to his house to see it. It showed improvement every time I saw it; looked better and larger, growing as well as any child could. I have five children."

There was evidence of the analysis of the rancid oil by the State Chemist, which showed it to be cottonseed oil, and not sweet or olive oil. He states that sweet oil is made of olives exclusively, and not cottonseed oil. There has been an imitation made of cottonseed oil, but he knew of none being on the market recently. They have, in the past, made the cottonseed oil and labeled it sweet oil. There was much other evidence, but we have stated only what was necessary to an understanding of the question before us.

At the close of the testimony, the court entered a nonsuit and plaintiff appealed.

Sapp & McKaughan, Holton & Holton and Dallas C. Kirby for plaintiff.

Jones & Clement, S. P. Graves, and Benbow, Hall & Benbow for defendant.

WALKER, J., after stating the facts as above: When there is a nonsuit upon the evidence, the appellant, as we have so often said, is entitled to have it considered as true and construed most favorably for him, and, he must also have the benefit of every inference that may reasonably be drawn therefrom. *Brittain v. Westhall*, 135 N. C., 492; *In re Will of Margaret Deyton*, 177 N. C., 503; *Angel v. Spruce Co.*, 178 N. C., 621. We do not pass upon the sufficiency of the evidence, but, as said in the *Margaret Deyton case, supra:* "In the case of a nonsuit or dismissal under the statute, the court does not weigh the evidence, but merely assumes it to be true in favor of the defeated party." If the evidence in this case is tested by this rule, it will be found ample for the jury to consider. The witness J. W. Newsome stated that he applied to Francis Kiger, the clerk in the defendant's store, for sweet oil, not cottonseed oil, and Kiger said he had no more 5-cent packages, but had 10-cent packages, thereupon the witness replied, "That will do if it is pure and all right." Kiger then stated, "It is pure sweet oil; I will guarantee it," and Newsome purchased a bottle, when he returned home he gave the child the usual quantity in a spoon, and very soon thereafter he was taken suddenly and seriously sick, in the manner described by the witness, and died from this illness about two weeks afterwards. When he smelled

the liquid in the bottle it was found to be "rancid," which word means having a rank smell or taste from chemical change or decomposition. There can be no doubt of there being *evidence* that the oil caused the sickness, which resulted in the child's death, without resorting to the doctor's expert opinion as a part of the evidence. But he was asked to smell the bottle, and to state if the rancid oil did not cause the vomiting and other symptoms, the doctor answering, "That is stale, rancid, and out of date. I know what to fight now; that is the cause of it," and Mr. Griffin, one of the defendants, stated, when asked by the witness if the State Chemist should find him with such oil, "I would say we kept it to grease automobiles," and the witness added, "Yes, to kill babies." When another doctor read the analysis of the oil, as made by the State Chemist, he remarked with profane emphasis, "No wonder the baby died." We conclude, therefore, that there is evidence that rancid oil was sold to the plaintiff for the child, and that it caused its death, but this would not be sufficient for a recovery unless it was sold negligently. It is not our purpose to enter upon an extensive discussion of the law in regard to the liability of apothecaries, druggists, and pharmacists in the conduct of their business, a few general principles will suffice in this appeal, where the facts may not all be before us. It is said in 19 Corpus Juris, at pp. 780 and 781: "The law imposes upon a druggist the duty so to conduct his business as to avoid acts in their nature dangerous to the lives of others, and one who is negligent in the performance of such duty is liable for damages to any person injured thereby. Where a druggist's clerk, in the course of his employment, negligently supplies a harmful drug in lieu of a harmless one called for, either by prescription or otherwise, and injury results from taking it, the druggist will be liable in damages." . . . "A druggist who negligently delivers a deleterious drug when a harmless one is called for is responsible to the customer for the consequences, as being guilty of a breach of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. The liability of the druggist in such case is not affected by the fact that he may also be subject to criminal prosecution, nor by the facts that the one purchasing the drug does not disclose the person for whom he is making the purchase."

The principle is thus stated in 9 Ruling Case Law, at pp. 702 and 703: "The public safety and security against the fatal consequences of negligence in keeping, handling, and disposing of dangerous drugs and medicines is a consideration to which no druggist can safely close his eyes. An imperative social duty requires of him such precautions as are liable to prevent death or serious injury to those who may, in the ordinary course of events, be exposed to the dangers incident to the traffic in which he is engaged, and it is therefore incumbent upon him to under-

stand his business, to know the properties of his drugs, and to be able to distinguish them from each other. It is his duty so to qualify himself, or to employ those who are so qualified, to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another; and so that, when a prescription is presented to be made up, the proper medicines, and none others, be used in mixing and compounding it. . . . A person engaged in the business of pharmacy holds himself out to the public as one having the peculiar learning and skill necessary to a safe and proper conducting of the business, while the general customer is not supposed to be skilled in the matter, and frequently does not know one drug from another, but relies on the druggist to furnish the article called for. . . . He must use due care to see that he does not sell to a purchaser or send to a patient a poison in place of a harmless drug, or even one innocent drug, calculate to produce a certain effect, in place of another sent for and designed to produce a different effect, and it is well settled that he will be liable for any injury proximately resulting from his negligence. Where death is caused by the negligence of a druggist the recovery of damages is governed by the usual rules relating to actions for wrongful death generally."

Speaking of the measure of care required of a druggist in selling drugs and medicines, it is said in 9 Ruling Case Law, at p. 704, sec. 11: "The legal measure of the duty of druggists towards their patrons, as in all other relations of life, is properly expressed by the phrase 'ordinary care,' yet it must not be forgotten that it is 'ordinary care' with reference to that special and peculiar business, and in determining what degree of prudence, vigilance, and thoughtfulness will fill the requirements of 'ordinary care' in compounding medicines and filling prescriptions, it is necessary to consider the poisonous character of many of the drugs with which the apothecary deals, and the grave and fatal consequence which may follow the want of due care. For the people trust not merely their health but their lives to the knowledge, care, and skill of druggists, and in many cases a slight want of care is liable to prove fatal to some one. It is therefore proper and reasonable that the care required shall be proportioned to the danger involved."

Another definition is "that ordinary care, in reference to the business of a druggist, must be held to signify the highest practicable degree of care consistent with the reasonable conduct of the business. *Wilson v. Faxon*, 208 N. Y., 108 (Ann. Cases, 1914, D. 49; 47 L. R. A. (N. S.), 693, and note); *Peters v. Johnson*, 50 W. Va., 644 (88 A. S. R., 909; 57 L. R. A., 428).

Plaintiff alleges that the defendants represented the contents of the bottle to be genuine sweet oil of standard purity, and also expressly warranted it to be of that kind and quality, and he offered evidence to prove

the truth of the allegation. He sues both on tort for negligence and on contract because of the warranty. It is not required of us to lay down the rule of damages upon either cause of action, as if he shows the actionable wrong, or the contract and its breach, he is entitled to some damages, even though they may be nominal, and this prevents a nonsuit.

The court erred in dismissing the action. Its judgment of nonsuit will be set aside, and a new trial ordered.

Error.

GREENLEAF JOHNSON LUMBER COMPANY v. J. W. VALENTINE, GUARDIAN OF ARTHUR JORDAN GRIFFIN, A MINOR, ET AL.

(Filed 14 April, 1920.)

1. Appeal and Error—"Moot" Questions.

Where the question on appeal is a "moot" question, the Supreme Court will not decide it.

2. Timber Contracts—Wills—Devise—Infants—"Moot" Questions—Cutting Period—Extension—Payment—Tender—Guardian and Ward—Testamentary Guardian.

The owner of lands sold a part thereof, reserving certain timber rights she had sold under a timber contract with privilege to the purchaser of the timber to renew by paying a certain price, and died having devised the other part of the tract, but covered by the timber contract, to her infant nephew for whom she appointed a testamentary guardian. In an action by the purchaser of the timber rights against the grantees of the deceased owner of the lands, and the testamentary guardian, in which the infant devisee personally had not been made a party or a guardian of his estate appointed, and it appears that the purchaser of the timber has cut it after the expiration of the first period and *Held*, the infant was the owner of the land upon which the timber had been growing, and the question presented as to whether payment or tender had been made in apt time to the testamentary guardian, etc., was a "moot" one, upon which the Supreme Court will not pass.

3. Same—Ownership of Land—Actions.

Where the infant owner has acquired the land by devise subject to a timber contract of the testator, the period for cutting and removing the timber to be renewed upon the payment by the purchaser of an agreed sum, and the time to renew the period for cutting, etc., has occurred after the testator's death, the question as to whether the infant would be benefitted by the renewal does not arise, but the question of payment or tender may only arise in an action in which the infant owner is a party and represented by the guardian of his estate; and where the purchaser of the timber has, notwithstanding, cut and sold the timber and holds the proceeds, the question of whether he committed an actionable wrong is presented.

CIVIL ACTION, tried before *Guion, J.*, and a jury, at November Term, 1919, of FRANKLIN.

The action purports to be one to establish a right in plaintiff company to cut the timber on a certain tract of land in said county belonging to an infant devisee, Arthur Jordan Griffin, and instituted against defendant, J. W. Valentine, as guardian of said minor, and the two other defendants who had purchased a portion of the land.

From the admission in the pleadings and the facts in evidence, it appeared that on 1 December, 1905, Martha Yarboro, the owner of the land, sold and conveyed to plaintiff the timber thereon of certain dimensions, to be cut within 10 years from date of said conveyance, and with the privilege of five years extension on payment of annual interest on the purchase price, etc.

That during the ten years said Martha Yarboro sold portions of the land to the two defendants, Wardrope and Bartholemew, excepting, however, "the timber and the timber rights sold to plaintiff company."

That in 1912 Martha Yarboro, the owner, died, having devised the land to Arthur Jordan Griffin, a minor, appointing defendant, J. W. Valentine, her executor and also guardian of the devisee.

Plaintiff alleged and offered evidence tending to show that within the time specified and required by the timber deed, it had paid or tendered the amount stipulated for securing the extension to J. W. Valentine, and had maintained such tender for the successive years, etc.

Defendants Wardrope and Bartholemew make no defense.

The defendant Valentine denies that any payment or tender of this extension money was ever made to him, and offered evidence in support of such denial.

It further appeared that the timber had been cut by plaintiff company and the proceeds held or appropriated by them.

On issue submitted the jury rendered the following verdict:

"1. Did the plaintiff, prior to 1 December, 1915, pay to defendant the amount required to renew its timber deed for the succeeding year? Answer: 'Yes.'"

On the verdict judgment was entered that plaintiff company owned the timber and was entitled to cut and remove the same.

Defendant excepted, and appealed.

William H. and Thomas W. Ruffin for plaintiff.

W. M. Person for Valentine, appellant.

HOKE, J. On careful consideration we think the record presents only a "moot question," and under our decisions the court should express no opinion concerning it. *Parker v. Bank*, 152 N. C., 253; *Blake v. Askew*,

76 N. C., 327. The cases on the subject hold that in order to secure the right of extension under one of these timber deeds as ordinarily drawn and unless otherwise expressed in the instrument the amount stipulated for must be paid or tendered to him who owns the title, when the payment is due. And where the owner has died within the time, the title passing by his will or descent the payment must be made or tendered to the devisee or heir. *Mizell v. Lumber Co.,* 174 N. C., 68; *Timber Co. v. Wells,* 171 N. C., 264; *Timber Co. v. Bryan,* 171 N. C., 266; *Bateman v. Lumber Co.,* 154 N. C., 248; *Hornthal v. Howcott,* 154 N. C., 228.

This action purports to be one to establish in plaintiff company the right to cut the timber on a certain tract of land now owned by a minor, Arthur Jordan Griffin, devised under the will of Mrs. Yarboro.

From the facts in evidence it appears that the timber had been cut when the suit was commenced, and it or its proceeds held by the plaintiff company, and there is no one now a party or against whom the suit is or purports to be prosecuted who seeks to challenge plaintiff's right or is in any position to do so. Not the adult defendants, their deeds contain exception in favor of the timber and the timber rights granted to plaintiff company, and they have no interest therefore in this controversy, and do not claim any. *Ricks v. McPherson,* 178 N. C., 154, 158, citing *Powell v. Lumber Co.,* 163 N. C., 36. Not the guardian—he does not own the timber, the title thereto is or was in the devisee, the minor, and it is from his interest and ownership that the right claimed by plaintiff must be secured. *Bryan v. Lumber Co., supra.*

Such a right, therefore, can only be established and made efficient in a suit which is and purports to be against or in favor of the infant, and to which he has been made a party. 21 Cyc., 193; 12 R. C. L., Guardian and Ward, p. 1146; 14 R. C. L., sec. 53.

It was stated on the argument and unchallenged, so far as noted, that such a suit had been instituted by the infant owner seeking to recover damages of the company for the alleged wrongful cutting of his timber. In view of this statement and the suggestions of the court in the recent case of *Morton v. Lumber Co.,* 178 N. C., 163, to this effect, that a suit in court and due inquiry would be required to establish a valid tender where the title was held by an infant. We deem it not amiss to say that the privilege of renewal having been provided for by a binding contract of the former owner—an inquiry into its fitness and whether such a stipulation would be to the advantage of the minor is no longer open to inquiry, and should it be properly shown in the alleged suit between the devisee and the company that a payment or tender of the amount required to secure the extension had been made by the company or its agent within the time, to the regularly constituted guardian of the infant's estate, it would suffice.

Such fact, however, to have any effect and meaning, should be established in a suit between the infant owner and the company and presenting the only real issue now existent in this controversy—that is, whether the cutting of the timber by the company amounted to an actionable wrong.

The case of *Morton v. Lumber Co.* was well decided as no payment or tender was shown within the time required to any one having authority to receive it. The suggestions referred to, however, are well calculated to mislead litigants in the trial of causes of this kind, and we take this early opportunity to correct the error.

For the reasons stated, we are of opinion and so hold that the present action be dismissed as presenting only a feigned issue, but without prejudice to the rights of the parties in any further litigation that may be had between them.

Action dismissed.

J. D. COTTLE, JR., v. W. B. F. JOHNSON.

(Filed 14 April, 1920.)

1. Husband and Wife—Alienation of Wife's Affection—Malice—Damages.

In order for the husband to recover punitive damages for the alienation of his wife's affection he must show directly or by implication that the act complained of was maliciously done, though not necessarily that it was done with ill will.

2. Husband and Wife—Alienation of Wife's Affection—Punitive Damages.

Punitive damages may be awarded in the discretion of the jury, in the husband's action for alienating the affections of his wife, when the defendant's act was by fraud, malice, recklessness or oppression or other willful and wanton aggravation on his part.

3. Same—Criminal Conversation.

The husband has personal and exclusive rights with regard to the person of his wife, and criminal conversation with her by another, notwithstanding her consent, constitutes an invasion of his rights.

4. Same—Instruction—Evidence—Appeal and Error—Reversible Error.

Where there is allegation and conflicting evidence that the defendant alienated the affections of the plaintiff's wife and also had criminal conversation with her, it is error for the trial judge to charge the jury that they may award punitive damages, in their discretion, without instructing them upon the law relating to the principles upon which punitive damages may only be awarded.

5. Husband and Wife—Alienation of Wife's Affection—Measure of Damages.

Compensatory damages awarded to the husband for the alienation of his wife's affection are for the loss of the society of his wife, and her affection and assistance, and for his humiliation and mental anguish.

6. Husband and Wife—Alienation of Wife's Affection—Evidence—Conversations—Correspondence—Collusion.

Where in the husband's action to recover damages for the alienation of the wife's affection there is evidence that the plaintiff and his wife lived happily together for several years when defendant induced and enticed the wife to leave her husband and continue to live separate from him, and to the contrary, that defendant's improper treatment of his wife had caused her to do so, it is competent, as a part of the *res gestae*, to show the feelings existing between the husband and wife prior to and after defendant's alleged wrong, by conversations and correspondence between them, though not as substantive evidence of the defendant's wrong, and the court should, by proper instructions, confine their consideration of this evidence within its proper bounds, to avoid affording opportunity for collusion.

7. Issues—Compensatory Damages—Punitive Damages—Courts—Discretion.

Where in an action for damages there is allegation and conflicting evidence sufficient to sustain a verdict of both compensatory and punitive damages, the better practice is to separate these issues, though this matter is addressed to the discretion of the trial court.

APPEAL by defendant from *Allen, J.*, at the September Term, 1919, of PENDER.

This is an action to recover damages for the alienation of the affections of the plaintiff's wife, and for criminal conversation.

The evidence of the plaintiff tended to show that he and his wife were married in 1913, and that they lived happily together until July, 1918, when the defendant induced and enticed her to leave him, and that she has lived separate from him since that time.

Also, that the relationship between the defendant and his wife was improper and criminal.

The evidence in behalf of the defendant tended to prove that he did not induce or entice the wife to leave the plaintiff; that she left him because of his improper treatment of her, and voluntarily went to the home of the defendant, where she lived with him and his wife as a companion and paying for her board.

His Honor admitted evidence of conversations between the plaintiff and his wife prior to the separation, and of letters written by them, and the defendant excepted.

The charge of his Honor on the issue of damages was as follows: "Upon that issue there is no other rule that I am aware of as to how

you will proceed except this: (If he is entitled to damages at all, he would be entitled to reasonable compensation for the injury done him—and reasonable compensation is one of these things you cannot measure like you would measure out corn or determine the price on a horse, or something of that kind; you have to consider all the circumstances, and say what, in your opinion, would be reasonable compensation to him for his damages.) To so much of his Honor's charge as appears in parentheses above the defendant, in apt time, excepted."

"And then, if you find he himself has been guilty of bad conduct towards his wife you may consider that by way of reducing the damages that you think he would otherwise be entitled to, and then say what that reasonable damage would be; and, then, you may (if you see fit, in your discretion, add to that what we call punitive damages—that is, damages by way of punishment—if you think it ought to be done—or exemplary damages, as it is sometimes called—and then say, in considering all those matters, what damages he would be entitled to). To so much of his Honor's charge as appears in parentheses, the defendant, in apt time, excepted."

The jury returned the following verdict:

"1. Did the defendant alienate the affections of the plaintiff's wife, and cause her to separate from her husband, the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant seduce and carnally know the plaintiff's wife, as alleged in the complaint? Answer: 'No.'

"3. If so, what amount of damages has the plaintiff sustained? Answer: '$8,000.' "

There was a judgment for the plaintiff, and the defendant excepted and appealed.

George R. Ward and C. E. McCullen for plaintiff.
McClammy & Burgwin and Stevens & Beasley for defendant.

ALLEN, J. The complaint alleges two causes of action, one for alienation of the affections of the wife of the plaintiff, and the other for criminal conversation.

The gravamen of the first cause of action is the deprivation of the husband of his conjugal right to the society, affection, and assistance of his wife, and of the second the defilement of the wife by sexual relation.

In Criminal Conversation: "The authorities show the husband has certain personal and exclusive rights with regard to the person of his wife, which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife

in fact consents to the act; because the wife is in law incapable of giving any consent to affect the husband's right as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful" (*Tinker v. Colwell,* 193 U. S., 473), and in an action for alienation of the affection it must be shown that the conduct of the defendant was intentional, and the defendant "is not liable unless he acted maliciously or from improper motives implying malice in law, whether he is a parent of or a stranger to the plaintiff's spouse." 13 R. C. L., 1466.

"It may be laid down as a general rule, at least where there is no element of seduction or adultery, that a defendant in an action for alienation of affections is not liable unless he acted maliciously, whether he is a parent of or stranger to the plaintiff's spouse. It is true that, as is hereinafter shown, it requires more evidence to establish malice on the part of the parent than is necessary in the case of a stranger, but this difference is an unevidential one merely. . . . The term 'malice' does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but implies merely a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions the injury. If the conduct is unjustifiable, and actually caused the injury complained of, malice in law will be implied. *Boland v. Stanley, supra; Westlake v. Westlake,* 34 Ohio St., 621; 32 Am. Rep., 397." *Geromini v. Brunelli,* 46 L. R. A. (N. S.), 465, note.

Malice is also defined as a disposition to do a wrong without legal excuse (*R. R. v. Hardware Co.,* 143 N. C., 54), or as a reckless indifference to the rights of others. *Logan v. Hodges,* 146 N. C., 44.

It does not necessarily mean ill-will, and includes a wrongful act knowingly and intentionally done without just cause or excuse. *Stanford v. Grocery Co.,* 143 N. C., 427. When understood in this sense, and as a necessary element in establishing the plaintiff's cause of action for alienation of affections, the finding upon the first issue that the defendant alienated the affections of the plaintiff's wife and caused her to separate from him, as alleged in the complaint, that is, maliciously, entitled the plaintiff to recover compensatory damages, which includes loss of the society of his wife, loss of her affection and assistance, as well as for his humiliation and mental anguish, but the right to punitive damages does not attach as matter of law, because the first issue was found for the plaintiff.

"The right under certain circumstances to recover damages of this character is well established with us; but, as said in *Holmes v. R. R.,* 94 N. C., 318, such damages are not to be allowed 'unless there is an

element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury.' And again, in the concurring opinion in *Ammons v. R. R.*, 140 N. C., 200, it is said: 'Such damages are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done willfully and under circumstances of oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights.'" *Stanford v. Grocery Co.*, 143 N. C., 427.

"This Court has said in many cases that punitive damages may be allowed, or not, as the jury see proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury." *Hayes v. R. R.*, 141 N. C., 199.

"In this Court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindicative damages, sometimes called 'smart money,' if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." *R. R. v. Prentice*, 147 U. S., 101.

"While every legal wrong entitles the party injured to recover damages sufficient to compensate for the injury inflicted, not every legal wrong entitles the injured party to recover exemplary damages. To warrant the allowance of such damages the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature. And so it is an almost universally recognized rule that such damages may be recovered in cases, and in only such cases, where the wrongful act complained of is characterized by some such circumstances of aggravation as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant." 8 R. C. L., 585.

"In order that there may be a recovery of exemplary damages, there must be present in the circumstances some element of malice, fraud, or gross negligence, otherwise the measure of damages is such an amount as will constitute a just and reasonable compensation for the loss sustained, and nothing more. In other words, the wrongs to which exemplary damages are applicable are those which, besides violating a right and inflicting actual damages, import insult, fraud, or oppression, and are not merely injuries, but injuries inflicted in a spirit of wanton disregard of the rights of others." 17 C. J., 974.

It follows, therefore, as it was incumbent on the plaintiff to show circumstances of aggravation in addition to the malice implied by law from the conduct of the defendant in causing the separation of the plaintiff and his wife, which was necessary to sustain a recovery of compensatory damages, and as the evidence was conflicting as to the conditions which brought about the alienation and separation, it was error to charge the jury they could award punitive damages without explaining to them that such damages could not be awarded unless the defendant acted from personal ill-will to the plaintiff, or wantonly, or oppressively, or from reckless indifference to his rights.

This is not the case of a charge, correct within itself, which fails to present the views of one or the other of the parties, who cannot complain in the absence of prayers for instructions, because here the instruction given is erroneous. The jury could not award punitive damages merely upon the finding on the first issue, as his Honor instructed them they could do.

The only other exception requiring notice is to the conversations between the plaintiff and his wife, and to the letters.

This evidence was not competent as substantive evidence of the guilt of the defendant, but was admissible for the purpose of showing the relationship between the plaintiff and his wife before they became associated with the defendant and afterwards.

"For the purpose of showing the terms on which the spouse lived, evidence of their declarations, letters to each other, etc., are admissible. So the state of a spouse's affections after the alleged alienation of his or her affections is material, and for the purpose of showing that his or her affections had been in fact alienated, evidence of his or her declarations and conduct showing a loss of affections is admissible." 13 R. C. L., 1476.

"When an act is done to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from whence the motive may be collected, is a part of the *res gestæ*. It was necessary to explain the reason the witness advised her to leave her husband, and for this purpose her complaints of ill treatment, with the marks of violence on her person, were competent testimony. When the conduct of the wife is in question, her declarations have been held admissible for her husband in an action against him." *Gilchrist v. Bale,* 34 A. D., 471.

"The mischief is a continuing one, going on from day to day, and becoming worse with the delay. The principles, therefore, which always allowed inquiry into the wife's feelings and conduct prior to and at the time of the seduction, must permit such inquiry during the whole period of alienation. The law cannot very well shut out what to every intelligent person must appear significant and free from any danger of fabri-

cation and falsehood. Most of this evidence is explanatory of the wife's residence with her parents, and is the only means, except examining her as a witness, of comprehending it. It is daily conduct, explained by concurrent declarations, and we do not think it is beyond the scope of inquiries always allowed in such cases." *Edgell v. Francis,* 66 Mich., 305.

In *Rudd v. Rounds,* 64 Vt., 439, *Ross, C. J.,* says: "This is an action brought to recover damages for an alienation of the affections of the plaintiff's wife, and thereby causing her to leave him. The wife's state of mind and regard for the plaintiff at the time she became acquainted with the defendant, and during the time of that acquaintance, until she left the plaintiff, and if there was a change during that period, whether caused by the conduct of the plaintiff, or the wrongful conduct of the defendant, were proper subjects of inquiry and investigation. The condition of her mind in regard to her husband, and what caused it to change from time to time, could be ascertained by her acts and conduct towards the plaintiff and defendant respectively, and by their acts and conduct towards her, and by her and their expression of their respective mental state towards and for each other, and of the causes thereof. The nature of the suit, and what was involved in its solution, opened a broad field of inquiry and investigation. The wrongful alienation of her affection by the defendant, resulting in her leaving, and refusing to live with the plaintiff, as his wife, constituted the gist of the action. Her leaving and refusal bore upon whether her affections had been alienated from some cause, and if caused by the wrongful conduct of the defendant, upon the amount of damages recoverable. What she said concurrent with, and while she was leaving the plaintiff's house, and on her way to the house where the defendant was stopping, and when she reached there, and her refusal at the request of the defendant to return to her husband, characterizing and giving the reason for her leaving, and refusal to return, were a part of the *res gestæ* of the leaving and refusal to return, and admissible in evidence."

We recognize the danger of evidence of this kind and the opportunity it affords for collusion, and for this reason it should be kept within proper bounds, with instructions as to how it should be considered, but in this case there was not only no collusion between husband and wife, but it appears that the wife was a witness for the defendant, and sustained his contentions throughout her testimony.

We have carefully considered the other exceptions and find no error in them.

The prayers for instructions were given in substance, and the other exceptions and to the charge are without merit.

This appeal illustrates the wisdom of separating the issues of compensatory and punitive damages, which is, however, a matter addressed to the discretion of the court.

For the error in the charge, a new trial is ordered on the issue of damages.

Partial new trial.

BROWN, J., dissenting.

B. R. GATLIN ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 14 April, 1920.)

1. Carriers of Goods—Negligence—Delay in Delivery—Destination—Mistake—Similar Names—Fertilizer—Damages to Crop.

Where a consignee sues a railroad company for its negligent delay of a shipment of nitrate of soda causing damages to his tobacco crop, and there is evidence tending to show that the defendant had a station known as Woodley's Siding on its road to which the shipment was addressed, and there was also a station in the Eastern part of the State named "Woodley's" to which the shipment was forwarded and where it remained until too late in the season to be used. It is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence, though the defendant was the delivering carrier and had not seen the bill of lading giving more specific designation of the shipment's destination, and the defendant had changed the name thereof, it appearing that the defendant had continued to recognize the former name of the station and had continued to transport freight there when so marked.

2. Same—Evidence—Presumptive Notice.

Upon evidence tending to show that a railroad company had caused damage to the consignee's tobacco crop by its negligent delay in forwarding a shipment of nitrate of soda to its proper destination, it will be presumed, under the circumstances of this case, that the carrier knew the shipment was intended to be used as fertilizer on his lands to aid in its better cultivation, and he may accordingly recover his proper damages.

3. Instructions—Carriers of Goods—Fertilizer—Delay in Delivery—Damages to Crop.

In this action by the consignee to recover damages against the carrier for its negligent delay in delivering to him a shipment of fertilizer, the Court properly charged the jury, upon the question of damages, to his crops, as to the plaintiff's burden of proof to show that it was the defendant's negligence that caused them and not weather or other conditions, etc.

BROWN, J., dissenting.

CIVIL ACTION, tried before *Allen, J.*, at January Term, 1920, of HOKE. Plaintiffs sued for damage to their cotton crop, which they alleged

was caused by the negligent failure of the defendants to carry and deliver to them one hundred and fifteen (115) bags of nitrate of soda, which was shipped from Wilmington, N. C. It was delivered for shipment to the Atlantic Coast Line Railway Company at Wilmington, which company issued a bill of lading marked, "To B. R. Gatlin, Woodley's Siding, N. C. (N. S. near Ellerbee)," a station in Richmond County, N. C. Its name had been changed to Plainview to prevent confusion, as there was a station on the Norfolk Southern Railway Company's line in Tyrrell County, N. C., called "Woodley." The soda was sent by way of Fayetteville and delivered there by the Atlantic Coast Line Railway Company to the Norfolk Southern Railway Company, but the latter's agent never saw the bill of lading, and received only the waybill, on which the address was Woodley's Siding, N. C., the words in brackets, "N. S. near Ellerbee," having been omitted. The agent of the Norfolk Southern Railway Company at Fayetteville forwarded the soda to Woodley in Tyrrell County, where it remained from 30 June, 1917, until 14 July, 1917, on which day it was reshipped by the Norfolk Southern Railway Company to Woodley's Siding, where it arrived on 17 July, 1917, and was delivered to the consignee on 18 July, 1917.

The defendant, Norfolk Southern Railway Company, contended that the negligence was that of the Atlantic Coast Line Railway Company in not giving the true address of the consignee on its waybill, or in not notifying it in some way, but his Honor failed to take that view, and holding that the Atlantic Coast Line Railway Company was faultless, he granted a nonsuit as to that company, and proceeded against the other defendant alone.

There was a verdict and judgment for the plaintiff, and an appeal by the defendant.

Smith & McQueen and Currie & Leach for appellees.

H. W. B. Whitley, H. McD. Robinson, and W. B. Rodman for appellant.

WALKER, J., after stating the case as above: First, the court committed no error in holding that there was evidence of negligence by the Norfolk Southern Railway Company, apart from the failure of its co-defendant to notify it of the proper address, and in this respect the case is unlike that of *Gregg v. City of Wilmington,* 155 N. C., 18. There the principal wrong was done by Woolvin in piling the bricks in the streets, and though he did so with the city's permission, or license, as between the defendant's, Woolvin's was the primary negligence which entitled the city to indemnity from him. In this case the Norfolk Southern Railway Company committed a distinct and independent act of negli-

gence from that of the Atlantic Coast Line Railway Company, in that, after it received the goods for the purpose of being forwarded to their final destination, it carelessly failed to do so, when it had a sufficient address, in view of the facts, to know what station was meant, that is, "Woodley's Siding," near Ellerbee, in Richmond County, and not Woodley, N. C., which is in Tyrrell County. There was evidence on the question, that, while the name of "Woodley's Siding" had been changed to Plainview, goods had been addressed to different parties at Woodley's Siding, and forwarded to and received at that place by the Norfolk Southern Railway Company and delivered there to the consignees. Plaintiff B. R. Gatlin testified that he had received shipments there constantly in 1917, addressed to him at Woodley's Siding, N. C., and that he "had shipped there for four years and never knew it by any other name." He lived one mile from the station. The defendant then recognized this as one of its stations by the name of "Woodley's Siding," and actually received and shipped goods to it by that name, although the name had been changed, which change, from the evidence, would seem not to have been put in force. At any rate, it was called by the name of Woodley's Siding, and this continued to be the case even after the change of name was made. Why the defendant should have sent the freight to Woodley, in Tyrrell County, a station far in the east, many miles away, and not having the same name, is not sufficiently or satisfactorily explained, or excused. The evidence of negligence in this respect was properly submitted to the jury.

Second. Without going into details, we are of the opinion that the requests for instructions were substantially given, especially those relating to the burden of proof, the bearing and demeanor of the witnesses, and lastly, as to the weather conditions, and not the negligence of the defendant, being the cause of the injury to the crop. The objections to the evidence are not of material importance, and could not have affected the result enough for us to disturb the verdict.

Third. There was some evidence as to the damages, which was not objected to, if objectionable, and which was properly submitted to the jury. It is hardly possible that defendant did not know for what purpose the nitrate of soda was being shipped, and that it was a fertilizer intended to be used on the plaintiff's lands to aid in its better cultivation. The case is governed in this respect by *Neal v. Hardware Co.*, 122 N. C., 104; *Herring v. Armwood,* 130 N. C., 177; *Lumber Co. v. R. R.,* 151 N. C., 23; *Pendergraph v. Express Co.,* 178 N. C., 344. See, also, *Tomlinson v. Morgan,* 166 N. C., 557; *Guano Co. v. Livestock Co.,* 168 N. C., 451; *Carter v. McGill,* 168 N. C., 507; S.c., 171 N. C., 775.

The verdict was a full one, and may have been too large, as contended by defendant, but a motion was made in the Superior Court to set it

aside as being against the weight of the evidence, which was denied, and we presume the judge was also asked to set it aside because the damages were excessive.

His decision on these motions are not reviewable in this Court.

No error.

BROWN, J., dissenting.

COMMISSIONERS OF CLEVELAND COUNTY v. SIDNEY SPITZER ET AL., TRADING AS SIDNEY SPITZER AND COMPANY.

(Filed 14 April, 1920.)

Taxation—Constitutional Law—Bonds—Statutes—Statutory Amendments—Interest—Counties.

Where in accordance with the Constitution and statutes, the question of an issue of bonds by a county for road purposes has been submitted by its proper authorities to its voters and favorably passed upon, they will not be declared invalid because before the enactment of a later statute only 5 per cent bonds were authorized, and the petition for the 6 per cent bonds was filed with the commissioners five days before the enactment of the amendatory law, but the order of the commissioners for the election and the election were after such enactment.

APPEAL by defendants from *Adams, J.*, at chambers, 17 February, 1920, from MOORE.

This is a controversy submitted without action under Rev., 803. This action was instituted in Cleveland County by the commissioners thereof, but by consent of parties it was agreed that the judge might hear and render judgment upon the case agreed in vacation and out of the district, and that the judgment should be filed immediately by the clerk of the Superior Court of Cleveland, each party reserving the right to appeal therefrom. From the judgment rendered the defendants appealed.

Ryburn & Hoey for plaintiffs.
J. H. Folger for defendants.

CLARK, C. J. On 21 July, 1919, after due advertisement, the commissioners of Cleveland offered for sale $30,000 road bonds issued on behalf of Township No. 11, "bearing 6 per cent interest, by virtue of ch. 122, Laws 1913, and acts amendatory thereof."

Ch. 122, Laws 1913, authorizing an election upon the issuance of these bonds was regularly enacted in the constitutional mode. By ch. 1886, Laws 1919, also duly enacted, and ratified 8 March, 1919, the aforesaid act was amended to authorize a change in the interest from 5 per cent

to 6 per cent. The petition to order this election was filed with the commissioners 3 March, 5 days before the ratification of the amendatory act, but they did not grant the order until at an adjourned meeting held 11 March. The election was duly held, and the issuance of the bonds bearing 6 per cent interest authorized by a vote of the people on 14 April thereafter.

The defendants were the last and highest bidders for the bonds, and admit the legality in all respects in the enactment of the statutes, and election, under which the bonds were issued, and that they were in conformity to the Constitution, but decline to accept the bonds upon the ground that they are invalid because the petition was filed with the commissioners prior to the ratification of the amendatory act authorizing the increase of interest to be borne by said bonds from 5 per cent to 6 per cent. There is no other question presented to us by this appeal.

At the time the commissioners granted the order, and consequently when the election was held, the authority to submit the proposition to the vote of the people had been regularly and constitutionally enacted. We cannot see that the filing of the petition before the act changing the rate of interest was ratified can in any way invalidate the issuance of the bonds. There is no authority exactly in point for the reason probably that an objection upon such state of facts has never been made before, and is now only presented out of abundant caution. In *Guire v. Comrs.*, 178 N. C., 39, the Court held that where the amendatory statute increasing the rate of interest from 5 per cent to 6 per cent was invalid, but the bonds had notwithstanding been voted at the election, the bonds issued at the rate of interest authorized in the prior statute would be valid. In the present case, the increased rate was authorized by a valid statute ratified before the issue of bonds was submitted to popular vote. The judgment of his Honor is

Affirmed.

MARY E. MIDDLETON ET AL. v. R. H. RIGSBEE, TRUSTEE, ET AL.

(Filed 14 April, 1920.)

1. Estates—Sales—Contingent Interests—Statutes—Pleadings—Demurrer—Evidence.

A testator devised his improved and unimproved lands, in the corporate limits of a town, to his daughter for life with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of Rev. sec. 1590, having made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that

the sale of the contemplated part to a purchaser she had secured for a certain price would meet the demands of the town for conformity with its certain health regulations as to the removal of surface privies, should enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purposes, etc.; that the property as it stood was rapidly depreciating, and there were no available funds, otherwise, to meet the necessary and insistent demands. Held, a demurrer was bad, and properly overruled.

2. Estates—Sales—Contingent Interests—Trusts.

Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estates in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust.

3. Same—Wills—Limitations.

The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of thirty years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation.

4. Estates—Tenants for Life—Maintenance—Remainderman—Costs Apportioned.

While a tenant for life may be required to make all the ordinary repairs incident to the present enjoyment of his estate and prevent its going to waste, he is not chargeable alone with the costs of permanent improvement which tends to enhance the value of the remainderman's estate as well as his own, and such costs should be properly apportioned between them.

5. Estates—Contingent Interests—Sales—Auction—Private Negotiations—Court's Discretion.

The sale of estates affected with contingent interests, made under the provisions of Rev., 1590, may, in the sound discretion of the trial judge, and subject to his approval, be sold either at public auction or by private negotiation, as the best interests of the parties may require.

CIVIL ACTION to sell land for improvement and reinvestment, under sec. 1590, Revisal, heard on demurrer to the complaint before *Stacy, J.*, at November Term, 1919, of DURHAM. There was judgment overruling the demurrer, and defendant excepted and appealed.

J. L. Morehead for plaintiffs.
Bryant, Brogden & Bryant for defendants.

HOKE, J. On matters more directly relevant to the inquiry the complaint alleges that under the will of her deceased father, Atlas M. Rigsbee, the *feme* plaintiff is the owner of a life estate in quite a number of lots in the city of Durham, improved and unimproved, with remainder to her children who may be living at the time of her death with ulterior limitations over to trustees on certain contingencies set forth in said will. That the present living children of *feme* plaintiff and all other ultimate takers who are known have been made parties defendant, and all who are infants or cannot now be ascertained, are represented by a guardian *ad litem* appointed by the court after due inquiry as the statute provides. Rev., 1590. That the houses on the improved lots let for a small weekly rental, aggregating not over $70 per month, and are at present in a run-down condition, greatly in need of repairs, new roofs, painting, etc., in order to keep them in a condition to make them attractive. Furthermore, the city of Durham has ordered plaintiff to install sewerage in many of the houses, and advised plaintiff that unless this is done the permits for the use of dry closets would be withdrawn, etc., all of which would result in large expenditures of money or in the loss of renters now occupying said houses, etc. That several of the vacant lots so devised to plaintiff, etc., are now low, seamed with gulleys and washouts, and of such grade formation as to be unfit for building in their present shape and condition, and practically of no value unless certain culverts and pipes are installed thereon, and the lots improved and leveled up to a proper grade with the streets and surrounding property.

That plaintiff has made an advantageous bargain with one R. J. Aiken to sell one of the lots 60 x 165 feet for $4,000, with the further consideration that said Aiken will remove a house now on said lot and place same in proper condition on one of the vacant lots owned by plaintiff for life, and further level up the gullies and washouts on the other vacant lots referred to, etc.

The complaint contains averment further that plaintiffs are not able financially to make the repairs which are now called for, and necessary to the preservation and proper use and enjoyment of the property, nor to meet the demands being now made by the city of Durham, nor are her children able to do so, and that the best interests of the estate and all of the parties will be materially enhanced by the sale of the 60-foot lot referred to, and by using the consideration in the improvement of the property as indicated, and by which its value and the present and future income will be greatly increased.

Upon these averments, admitted in the demurrer to be true, we concur in the view of his Honor, and are of opinion that the demurrer has been properly overruled.

As appertaining to the facts of this record, the decided cases on the subject hold that courts in the exercise of general equitable jurisdiction may decree a sale of property for reinvestment, where it is shown that such a course is required for the preservation of the estate and the protection of its owners. And the position may in proper instances be extended to a sale of a portion of the property for the protection and preservation of the remainder.

The principle adverted to has been not infrequently applied in the proper administration of charitable and other trusts, and the exercise of the power has been justified and upheld, notwithstanding limitations in the lease or deed creating the estate which apparently imposed restrictions on the powers of the trustees in this respect when it is properly established that a sale is required by the necessities of the case, and the successful carrying out of the dominant purposes of the trust. *Trust Co. v. Nicholson,* 162 N. C., 257; *Grace Church v. Ange,* 161 N. C., 315; *Jones v. Haversham,* 107 U. S., 175; *Stanly v. Colt,* 72 U. S., 119-169; *Weld v. Weld,* 23 Rd. Island, 311. And in a well considered case of *Gavin v. Curtin,* 171 Ill., 640, the doctrine was extended to the case of a life tenant and ulterior remainderman on contingency of a common-law estate where it was made to appear that a piece of property in the city of Chicago, valuable but unproductive, by reason of accumulating taxes and charges upon it, would be entirely lost to the owners unless a sale could be made—the principle ruling in the case being stated as follows: "Upon a bill by a life tenant equity may appoint trustees to take the fee in the property, sell the same, reinvest the proceeds for the benefit of the life tenant and the remainderman, where it appears that unless equity interferes the property will be lost to both life tenant and remainderman." The position is put beyond question in the present case, this being a proceeding under sec. 1590 of the Revisal, authorizing a sale of property affected by certain contingencies, and the statute making express provision to the effect that when the interest of all the parties would be materially enhanced by it, a sale may be had of the property or any portion for reinvestment either in purchasing or improving real estate. And the Court having held that by correct interpretation the statute authorizes, in proper instances, a sale of a part of the property for the preservation and improvement of the remainder. *Smith v. Miller,* 158 N. C., 99, and *same case,* 151 N. C., 620.

In approving this position we have not been inadvertent to the clause in the will which provides that the principal of the trust fund shall not be used or diminished during the period of 30 years, except to pay the premiums on certain specified insurance policies. This limitation applies only to the administration of the trust estate, and an examination of the cases cited will disclose that while such a provision may at times

be effective as against the voluntary action of the trustees, it will not operate to prevent the court from ordering a sale when required by the necessities of the estate.

Again, on matters relevant to the inquiry, while authority is to the effect that a life tenant is required to make all the ordinary repairs incident to the present enjoyment of the property, and required to prevent its going to waste, he is not chargeable alone with the costs of permanent improvements thereon, and which tend to enhance the value of the remainderman's estate as well as his own. The decisions on the subject hold that these should be properly apportioned between them, and that the cost of sewerage required by valid municipal regulations comes well within the principle. *In re Laytin,* 20 N. Y. Supp., 72; *Huston v. Tribbetts,* 171 Ill., 547; *Wilson, Admr., v. Edmonds,* 24 N. H., 517; *Hay et al. v. McDaniel,* 26 Ind. Appel. Ct., 683; *Chambers v. Chambers,* 20 R. I., 370; *Kline v. Dowling,* 176 Ind., 521.

In this last citation the correct doctrine is stated as follows: "A tenant for life must make all ordinary repairs, but is not bound to make permanent improvements, such as sewers and farm drains, which add to the value of both the life estate and remainder, and the burden of making them should be equitably prorated between the life tenant and remainderman, taking into account the probable duration of the life estate and other relevant facts."

And further, it is the accepted position in this jurisdiction that where the power of sale exists, and the question is properly presented, such sale may be had in the sound discretion of the court, and subject to its approval, either at public auction or by private negotiation, as the best interests of the parties may require. *Thompson v. Rospigliosi,* 162 N. C., 146, and authorities cited.

A correct application of these principles is in full support of the power of sale on the facts presented, and the judgment of his Honor overruling the demurrer is

Affirmed.

ALLEN, J., not sitting.

KATIE NORWOOD v. THE GRAND LODGE OF MASONS ET AL.

(Filed 14 April, 1920.)

1. Insurance— Fraternal Orders— Principal and Agent— Settlement— Fraud—Evidence—Nonsuit—Trials.

An illiterate beneficiary brought her action against an insurance order and its local officer to recover upon a matured policy, and there was evidence tending to show that at the solicitation of the local officer she had

made him her agent to collect the insurance upon this policy, and that in another company which had been carried by the insured, and in which she was the beneficiary; that while the local officer had remittances in full from both companies, he misrepresented that he had only been able to collect a part of the insurance, for that the insured had not been in good standing in either order at his death, and had her to endorse the remittances in full without knowledge of the facts, etc. Pending the action the defendant order, for which the codefendant was a local officer, had a committee to see the plaintiff and misrepresent that the money she had received was upon its policy and paid her the difference in money between that amount and the face value of its policy, and obtained a receipt in full: *Held*, sufficient to sustain plaintiff's allegation of fraud against both defendants, and, if otherwise, at least to recover against the local officer, her agent, the balance of the money he had collected in her behalf; and any evidence of misrepresentations made by the committee of defendant order in obtaining the plaintiff's receipt in behalf of both defendants, was also competent against her agent, the local officer thereof.

2. Fraud—Receipts—Evidence—Presumptions—Rebuttal—Principal and Agent.

Receipts obtained by fraud from the beneficiary in settlement of a policy of life insurance are only *prima facie* evidence of their correctness, and will not preclude the plaintiff, in her action to recover, from showing the true amount of the money she had received.

APPEAL by defendant from *McElroy, J.*, at the November Term, 1920, of ROCKINGHAM.

This is an action brought by Katie Norwood, widow of A. W. Norwood, against the Grand Lodge of Masons and R. S. Graves, to recover the balance alleged to be due on a policy of insurance for $300 held by her husband in the benefit department of the Masonic Order.

The defendants admitted that the policy of insurance had been issued, and that the plaintiff was the beneficiary therein, and alleged that the amount due thereon had been paid to the plaintiff.

The plaintiff introduced evidence tending to prove that in addition to the policy of $300 in the Masonic Order, her husband also had a policy of $200 in the Odd Fellows Order; that shortly after her husband died the defendant, R. S. Graves, came to her and asked her to give him both policies and that he would collect the money due on the policies for her; that she gave the policies to him, and in about a month thereafter the said Graves told her that her husband was not in good standing at the time of his death, and he didn't think he could get all of the money; that about a month after this conversation the said Graves sent for her again, and then told her that he was unable to collect the full sum due, that he could only collect $100 from the Odd Fellows and $100 from the Masons, making $200 on both policies, and that these two orders refused to pay more than that sum; that her husband was not in good

standing with either lodge, and he advised that she accept the said sum; that the plaintiff was an uneducated negro woman, who read with difficulty, and the said Graves was an educated intelligent negro man; that at the time he told the plaintiff that the Odd Fellows and the Masons would not pay more than $200 he had in his possession three money orders of $100 each delivered to him by the Masons to be used in the payment of the policy of $300, and a draft for $200, delivered to him by the Odd Fellows, with which to pay the policy of the Odd Fellows; that he also told her in this conversation that there was an attorney's fee of $25 that would have to be paid out of the $200 he had collected; that relying on these statements she accepted $175 in settlement for the two policies and executed receipts in full; that at the same time he asked her to sign several papers, and without knowing what they were she indorsed the three money orders for $100 each, and the draft for $200, and they were delivered to the said Graves; that some time thereafter she learned that Graves had collected $500 on the two policies; that he came to see her again, and made other representations to her which were false, and paid her the additional sum of $25, which she claimed was the balance due on the policy of the Odd Fellows, and that she had received nothing from the Masonic Order; that after this action was commenced a committee from the local lodge of the Masons at Reidsville went to see her and asked her how much she claimed to be due, and that she told them that she had not received anything from the Masons; that they told her that the money that she had received was on the Masonic policy; that the $175 and the $25 was paid on that policy, and that they gave her an additional sum of $100, she relying on their statement that $100 had already been paid on their policy; that in the several transactions she gave receipts aggregating $900 or $1,100, when in fact she only received $300 on both policies.

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was overruled, and the defendants excepted.

His Honor charged the jury, among other things, as follows: "If you find by the greater weight of the evidence that when the receipt was procured by the committee for $300 that the committee represented to her that the Masons had already paid her the sum of $200, when in truth and in fact they had not paid her anything, and she, relying upon their statements and believing it to be true, that the $200 which had been paid her had come from the Masons, when in truth and in fact it had not come from the Masonic Order, then if you find these facts by the greater weight of the evidence, the court charges you it would be your duty to answer the issue ('Yes'; that this receipt was procured by fraud and misrepresentation." The defendant excepted.

The jury returned the following verdict:

"1. At the time of the death of A. W. Norwood did he have a certificate of insurance in the Masonic Lodge in the amount of $300? Answer: 'Yes.'

"2. Is the plaintiff, Katie Norwood, the beneficiary named in the certificate of insurance in the amount of $300 insured by the Masonic Insurance Department? Answer: 'Yes.'

"3. Did the defendants, or either of them, obtain receipts from the plaintiff for the $300 referred to in the Masonic certificate of insurance? Answer: 'Yes.'

"4. If so, were said receipts obtained by fraud or misrepresentation? Answer: 'Yes.'

"5. Are the defendants, or either of them, indebted to the plaintiff? If so, what amount? Answer: '$200, and interest from date of post-office money orders, but not the Grand Lodge, but R. S. Graves.'"

Judgment was entered upon the verdict against the defendant, R. S. Graves, alone, and he excepted and appealed.

J. M. Sharp and J. R. Joyce for plaintiff.
P. W. Glidewell and W. R. Dalton for defendant.

ALLEN, J. The recital of the evidence as stated above fully justifies the refusal of his Honor to grant the motion of the defendant for judgment of nonsuit, and is ample to sustain the allegations of fraud.

If, however, there was no fraud in the transaction, the evidence shows that the defendant Graves was the agent of the plaintiff for the collection of the policies; that he collected $500, and has only paid to her $300, and he would of course be required to pay to her the balance of the money in his hands.

The receipts purporting to cover the entire amounts collected by the defendant Graves are only *prima facie* evidence of their correctness, and would not preclude the plaintiff from showing the true amount of the money paid to her.

"When a receipt is evidence of a contract between parties it stands on the same footing with other contracts in writing, and cannot be contradicted or varied by parol evidence; but when it is an acknowledgment of the payment of money or of the delivery of goods, it is merely *prima facie* evidence of the fact which it recites, and may be contradicted by oral testimony. 1 Greenleaf on Evidence, sec. 308; *Reid v. Reid*, 2 Dev., 247; *Wilson v. Derr*, 69 N. C., 137." *Harper v. Dail*, 92 N. C., 397.

The cases in our reports in support of this proposition are numerous.

The exception to the charge upon the ground that the committee from the lodge were not the agents of the defendant Graves, and that therefore he is not bound by their representations would be entitled to more con-

sideration but for the fact that at that time the inquiry was pending before the jury as to the liability of the Masonic Order as well as the liability of the defendant Graves, and as the Masonic Order was relying upon the plea of payment and of the receipt procured by the members of the committee it was proper for the judge to charge the jury that if they made misrepresentations in order to procure the receipts that the plaintiff would not be bound by them.

These are the exceptions principally relied on by the defendant.

We have, however, examined all of the exceptions, and find

No error.

MARY C. PERRY, ADMINISTRATRIX, v. FRED C. PERRY.

(Filed 14 April, 1920.)

1. Judicial Sales—Bidders—Proposed Purchasers—Sales.

The highest bidder at a judicial sale is only regarded as a proposed purchaser, who acquires no independent right in the land, or the suit, until the sale has been reported to the court and confirmed, in the course and practice of the courts.

2. Public Sales—Statutes—Lands—Executors and Administrators—Assets—Clerks of Court—Orders—Resales—Appeal—Courts—Jurisdiction—Evidence—Judgment.

A proceeding to sell lands to make assets to pay the debts of the deceased, Rev., 723, is appealable from the clerk of the Superior Court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Rev., 610, 611, 612, 613, 614.

3. Same.

The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person has sold them several times under resales ordered by the clerk of the Superior Court, and that the clerk has granted the purchaser's motion to confirm the sale after the lapse of more than twenty days from the last sale, without an advanced bid until after the expiration of that time, does not affect the jurisdiction of the judge on appeal to examine into the matter and order another resale upon being satisfied that justice and the rights of the parties require it.

PETITION to sell land to make assets, heard on appeal from clerk, before *Long, J.*, at March Term, 1920, of FORSYTH.

The questions presented and the pertinent facts are very clearly set forth in the case on appeal, as follows:

"This is a special proceedings originating before the clerk of the Superior Court of Forsyth County, upon the petition of Mary C. Perry,

administratrix of W. S. Perry, for the sale of land to make assets to pay debts. This petition deals with several distinct tracts of land, but there is involved in this appeal only tracts 5 and 6 as described in said petition, which tracts were later subdivided into lots and thereafter were and are referred to as lots 16 to 22, inclusive. At the sale J. E. Van Horn was the purchaser of the aforesaid lots, and upon report of said sale to the clerk of the court and upon the application in writing of the said J. E. Van Horn, said sale was confirmed by the clerk of the court on 21 January, 1920. To which order of confirmation the petitioner excepted and appealed to the judge of the Superior Court, in which appeal the guardian of the infant defendant subsequently joined, which appeal was heard before B. F. Long, judge, at Winston-Salem, N. C., on 8 March, 1920, at which time he ordered a resale of the property purchased by the said J. E. Van Horn, and in all other respects affirmed the said order of the clerk.

"Said lots were sold on 23 August, 1919, at which time they brought the sum of $1,516. This sale was reported by the commissioner to the court on 3 September, 1919, with the statement that the price bid was a fair and reasonable one, and the confirmation of the sale was recommended. By a supplemental report of date 15 September, 1919, the commissioner reported that an increased bid had been offered on lots 16, 17, 18, 19, 20, 21, and 22; and a request was made for the resale of those lots as aforesaid. In accordance with the request of the commissioner as aforesaid, a resale of said property was had on 11 October, 1919, when and where J. E. Van Horn was purchaser of the aforesaid lots at the price of $1,872, and this sale was reported to the court on 22 October, 1919, by the commissioner, with the statement that the price bid was fair and reasonable, and she recommended confirmation of the sale. By a supplemental report of date 13 November, 1919, the commissioner called to the attention of the court that there has been offered an increased bid on said lots, as a result of which a resale was ordered, which was had on 29 November, 1919, when and where the aforesaid lots were bid off again by the said J. E. Van Horn at $1,970, and on 4 December, 1919, a report of this sale was made by the commissioner recommending confirmation.

"On 27 December, 1919, the said J. E. Van Horn filed with the clerk of the court a written request that said sale be confirmed, the twenty days required having elapsed.

"On 1 January, 1920, the commissioner filed a supplemental report, setting forth that she had received an increased bid of $30 on said lots, and asked for a resale.

"On 8 January, 1920, the commissioner filed a second supplemental report, reciting that she had received an increased bid of $197, and asked for a resale.

"With the record in this condition, the matter came on before the clerk of the Superior Court, and on 21 January, 1920, he signed an order in which he found facts and overruled the request of the commissioner for a resale and affirmed the sale. The facts found in said order are as follows:

"1. That the indebtedness of the estate amounts to about fifteen thousand ($15,000) dollars, and upon which interest is accruing at the rate of about $75 per month.

"2. That there have been two other sales of this property, the present sale being the third one.

"3. That on 27 December, 1919, J. E. Van Horn, a purchaser at said land sale of certain parts of the property, filed with the court written requests for confirmation of sale.

"4. That on 1 January, 1920, the commissioner filed a report stating that an increased bid had been offered upon certain parcels of land sold, and on 8 January, 1920, filed a report setting forth that a 10 per cent bid had been offered on the property bid off by J. E. Van Horn, but it was not stated in either of said reports that any security had been given or deposit made by the persons filing said increased bid for the performance of said bid.

"5. Considering the costs of a resale, and the monthly interest accruing upon the indebtedness, and the other facts and circumstances herein set out, I find as a fact that the increased bids are inadequate and ought not to cause a resale, and for these reasons, and also because the purchasers acquired rights in the premises, I make this order confirming each and every of said sales.

"To this order of the clerk confirming the sale, the petitioner excepted and gave notice of appeal to the judge of the Superior Court in which appeal the guardian of the infant defendant subsequently joined. This appeal came on to be heard before Long, judge, at Winston-Salem, N. C., on 8 March, 1920, at which time the said judge was present to hear only motions, the court in all other respects having been adjourned on account of influenza, and upon the hearing thereof and upon the consideration of affidavits of J. C. Brock, the petitioner, G. C. Davis, S. F. Wooten, and J. A. Lancaster, which will be in the record, and the securing of the 20 per cent increased bid, the order of the clerk was reversed and a resale of the aforesaid lots ordered. To which order of Judge Long the said J. E. Van Horn, in open court, excepted and appealed."

Hamilton & Morris and Manly, Hendren & Womble for appellants.
Holton & Holton and R. C. Brock for appellees.

HOKE, J. It is the generally accepted principle that the highest bidder at a judicial sale is only regarded as a preferred proposer, and

that he has no independent right in the property or the suit until the sale has been reported to the court and confirmed. Thus, in *Harrell v. Blythe,* 140 N. C., 415, it was held that "judicial sales are only conditional, and are not complete until reported to and confirmed by the court, and the bid may be rejected and the sale set aside if, in the exercise of its sound discretion, the court should think proper to do so, and *Walker, J.,* delivering the opinion, further states the position as follows: "When land is sold under a decree of the court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation which is the judicial sanction or the acceptance of the court, and, until it is obtained, the bargain is not complete." *Joyner v. Futrell,* 136 N. C., 301, and many other well considered cases are to the same effect. And this "confirmation of the sale" referred to and contemplated by these authorities means confirmation that has been fixed and determined according to the course and practice of the court. And, when an appeal is taken in apt time from the clerk to the judge, the question under our procedure, is open to revision and such further orders and decrees on his part as the right and justice of the case may require, and to be heard and decided by him on the same or such additional evidence as may aid him to correct conclusion in the matter.

It is well understood that the action of the clerk, in approving or setting aside judicial sales, is an appealable order. This has been so held in authoritative cases construing the general statutes regulating appeals from the clerk to the judge. Rev., secs. 610-11-12-13, and the ruling is emphasized and extended by sec. 614, providing that whenever any civil action or special proceeding, begun before the clerk of any Superior Court, shall be, for any ground whatever, sent to the Superior Court, before the judge, the judge shall have jurisdiction, etc., etc. *Taylor v. Carrow,* 156 N. C., 6; *Beckwith, ex parte,* 124 N. C., 111; *McMillan v. McMillan,* 123 N. C., 577; *Lovinier v. Pearce,* 70 N. C., 169.

This being a proceeding to sell land to make assets, in the due administration of an estate and on appeal taken in apt time, it having been made to appear that the property was bid off at an undervalue, that fact confirmed and established by an advanced bid of 20 per cent, in our opinion, his Honor was in the provident exercise of his powers in setting aside the bid made, and ordering a resale. The more recent cases of *Ex parte Garrett,* 174 N. C., 343, and *Upchurch v. Upchurch,* 173 N. C., 88, are decisions construing sec. 2513, regulating sales for partition, and which seem to confer on the purchaser the right of confirmation after 20 days from report of sale filed, and when no objection is made before motion for confirmation entered.

Whether these cases correctly interpret the statute referred to or are in necessary conflict with the principles approved by the Court in *Taylor v. Carrow,* 156 N. C., 6, a decision also on the proper procedure in partition cases is not now before us, the instant case, as stated, being a petition to sell land for assets which comes in this respect under a different statute, permissive in terms, Rev., 723, and thus far governed by the general principles appertaining to judicial sales to which we have heretofore adverted.

We find no error in the record, and the judgment of his Honor is Affirmed.

S. A. HODGIN v. NORTH CAROLINA PUBLIC SERVICE CORPORATION AND R. G. LASSITER & COMPANY.

(Filed 14 April, 1920.)

1. Negligence—Contributory Negligence—Evidence—Questions for Jury —Trials.

Where there is evidence that a street car of the defendant street railway company negligently struck and injured a pedestrian along its track and injured him, and conflicting evidence as to whether he was in a place of safety and changed his position when it was too late for the defendant to have avoided the injury, a question of fact is presented upon the issue of contributory negligence for the determination of the jury.

2. Same—Torts—Joint Tort Feasors.

Where the injury complained of is that the plaintiff, a pedestrian, was negligently struck by a moving street car of the defendant, and thrown in front of the codefendant's heavily loaded truck, and received a greater injury, and there is conflicting evidence of the negligence of each defendant: *Held,* if the negligence of both defendants was established and the plaintiff was not guilty of contributory negligence, the defendants were joint feasors and jointly and severally liable.

3. Negligence—Torts—Joint Tort Feasors—Instructions—Primary and Secondary Liability—New Trials—Appeal and Error.

Where the evidence tends only to show that the two defendants sued for damages for negligence in inflicting a personal injury, were joint tort feasors, an instruction thereon relating to their primary and secondary liability is reversible error, but not requiring a new trial to be ordered when this issue may be stricken out without prejudice to the appellant.

APPEAL by both defendants from *Bryson, J.,* at October Term, 1919, of GUILFORD.

This was an action for personal injuries against the North Carolina Public Service Company and R. G. Lassiter & Company as joint tort feasors.

About noon on 13 March, 1917, the plaintiff was walking west on Spring Garden Street about three-quarters of a mile outside of the city limits of Greensboro. The road was straight and the view was unobstructed eastward behind the plaintiff, for 600 or 700 feet. Approaching him from the rear and going in the same westward direction was the street car of the defendant North Carolina Public Service Company, and about ten feet behind and in close proximity to it was the truck of the defendant Lassiter Company, loaded with three and a half tons of asphalt. The street was paved with asphalt and the plaintiff was walking along the concrete binder, on the north side of the street, which divides the street proper from the space used by the street car track which is unpaved. There was evidence that the street car was running some ten miles an hour and without warning or notice of any kind being given by the motorman operating the defendant street car, or from the chauffeur driving the truck of Lassiter & Company, they attempted to pass the plaintiff at almost the same time. The street car hit the plaintiff on his right shoulder and knocked him down in front of the oncoming truck, which struck his head, inflicting serious injuries. His face was badly cut and bruised, the tear duct of his eye was severed so that there is a continuous flow from it, and it is impossible for him to close it. His jaw was so injured that he has great difficulty to chew his food or to open his mouth, and his nervous system was greatly impaired from the shock.

The jury found on the issues submitted that:

1. The plaintiff was injured by the negligence of the defendant, the North Carolina Public Service Company, as alleged in the complaint.

2. That the plaintiff was injured by the negligence of the R. G. Lassiter Company, as alleged in the complaint.

3 and 4. That the plaintiff did not by his own negligence contribute to his injury inflicted by either company.

5. That the plaintiff sustained damages $2,500.

6. That the North Carolina Public Service Company is primarily liable.

From the judgment on the verdict both defendants appealed.

Clifford Frazier, W. P. Bynum, and R. C. Strudwick for plaintiff.

Brooks, Sapp & Kelly for defendant North Carolina Public Service Company.

Parham & Lassiter and King & King for defendant R. G. Lassiter & Company.

CLARK, C. J. The defendant Public Service Company contended that the defendant was in a place of safety until a few seconds prior to the

collision, and that when he changed his position it was too late for the motorman to avoid striking him. There was conflicting evidence on this point, and the jury found on the issues of fact that the defendant Public Service Company was guilty of negligence, and that the plaintiff did not contribute by his own negligence to the injury.

The defendant Lassiter & Company contended that the injury was caused by the street car company, and that when the plaintiff was knocked into the street it was too late for the driver of the truck of the defendant Lassiter & Company to avoid striking him, and contended that the plaintiff was guilty of contributory negligence by walking in the street until he could pass the obstruction. There was much evidence as to the facts concerning this, and as to the details of the occurrence itself, but these were matters for the jury, who have found in response to the issues that the defendant Lassiter & Company was guilty of negligence, and the plaintiff did not by his own negligence contribute to the injury sustained by him from the truck.

The plaintiff was struck by the street car as the jury found, by reason of the negligence of the motorman, and upon such findings the Public Service Company was liable. The injuries, however, sustained thereby were slight compared with those inflicted by Lassiter & Company's heavily laden truck, which the jury have found were caused by the negligence of the driver, it therefore was also liable.

There is evidence which the jury found to be true that both the motorman on the street car and the chauffeur of the truck saw the plaintiff walking on the binder dividing the roadway from that part of the road occupied by the street car track, and though seeing him thus hemmed in each party negligently struck him. Both defendants therefore are joint tort feasors, upon the findings of fact.

In *Gregg v. Wilmington,* 155 N. C., 18, where the city permitted its codefendant to pile upon the sidewalk bricks taken from a building being torn down, and the codefendant negligently piled the brick in such a manner as caused the alleged injury, the city was held not responsible in damages unless it permitted the continuance of the negligent act after it was fixed with notice thereof. In that case, it was held that the negligence was that of the codefendant, and the city was not responsible for its previous act in permitting the piling, which was within its discretion. In *Ridge v. High Point,* 176 N. C., 421, it was held that the city was not liable for an injury caused by its codefendant, because it allowed the latter to operate a street car line. In *Barnes v. R. R. and Express Co.,* 178 N. C., 265, it was held that where the wrongful death was caused by the express company, in the negligent loading of a heavy shaft which would not have produced the injury but for the concurrent negligence of the railroad company in moving the car while being loaded that the defendants were joint tort feasors.

The two cases first named are clearly distinguishable from the present, while the latter closely resembles it. The authorities are fully discussed in those three cases, and we need not repeat the discussion. On the findings of fact by the jury the injury was caused by the negligence of both defendants contributing thereto. They were joint tort feasors and jointly and severally liable. It was not a case presenting the question of primary and secondary liability, and the charge of the court upon the sixth issue was erroneous, but this does not require a new trial. That issue will be struck out, and the judgment will be modified in accordance with this opinion.

Modified and affirmed.

ALLEN, J., dissented from the ruling as to defendant Lassiter.

JOHN W. LAMBETH v. CITY OF THOMASVILLE.

(Filed 14 April, 1920.)

1. Appeal and Error—Cities and Towns—Ultra Vires—Ordinary Powers.

Where the question of *ultra vires* is not raised by assignment of error or brief in an action against a city upon the contract with regard to its streets, sewers, etc., it will be assumed on appeal that the defendant is vested with the usual authority to construct such work within its limits, and to contract with regard to it.

2. Cities and Towns—Contracts—Water—Sewerage—Streets—Sidewalks—Evidence—Questions for Jury—Nonsuit—Trials.

A city entered into a contract authorized by ordinance, with the owner of lands, surveyed into lots and to be thus sold at public outcry, that in consideration of the cities receiving certain of these lots for a public use, and the right of way over other of the lands for a street extension, and for laying sewer and water connection, and also for a monetary consideration, it would extend its sewer and water mains, for the use of the purchasers of the lots proposed to be sold, and having acquired the lot and the land for street purposes, the city failed to put in the sewer and water mains, though repeatedly urged by the owner, until after the contemplated sale. In an action by the owner for damages against the city for breach of the contract upon the ground that the lots would have brought a greater price with the improvements: *Held*, evidence of this character was sufficient, and a motion for judgment as of nonsuit was properly denied.

3. Same—Damages.

Where there is evidence that by a breach of its contract to put in water and sewer main connection for the benefit of purchasers of lands laid off and to be sold into lots, a city had caused damage to the owner by the failure of the lots to bring the prices they would otherwise have brought,

the amount of damages recoverable, upon competent evidence, is the difference between the market value of the land without the water main and sewer connection and what would have been the actual market value at the time of the sale, with the water and sewer connections, and does not fall within the rule that speculative profits are not recoverable.

4. Same—Opinion Evidence—Approximate Loss.

Where the plaintiff may recover as damages to land for breach by defendants of its contract, the difference between the market values affected by the breach, such values may be proven by opinion evidence of witnesses properly qualified to speak from experience and observation, with reasonable certainty, though the plaintiff can give his loss only approximately.

5. Contracts—Performance—Reasonable Time—Cities and Towns.

Where a city has damaged the plaintiff's land by breach of its contract in delaying to put in sewer and water mains, thus causing the plaintiff loss in a public sale of lots therein laid off, and the mayor of the city, during the sale, had stated the city would comply with its contract with which, afterwards, it did comply: *Held*, there being no time limit stated in which the city should do this work, the contract implies that it should be done in a reasonable time, in which should be considered the situation of the parties, the subject-matter of the contract, and all the circumstances attending its performance.

6. Same—Questions of Law—Instructions—Appeal and Error.

While the question of reasonable time for the performance of a contract wherein the time therefor is not specified is ordinarily a question of law, in this case it was properly left to the jury under a correct charge, which the jury could not have failed to understand.

CIVIL ACTION, tried before *Bryson, J.*, at November Term, 1919, of DAVIDSON.

The action is brought for a breach of the following contract entered into between the plaintiff and the defendant on 26 March, 1917:

"Upon motion of M. H. Stone, seconded by T. A. Finch, it is ordained by the city council of the city of Thomasville, in regular session, 26 March, 1919, that the propositions of Mr. J. W. Lambeth submitted at this meeting be adopted and accepted. The propositions are as follows, viz.:

"First. In consideration of a conveyance from said J. W. Lambeth of sufficient land to the city of Thomasville to lay out, open, construct, and extend Taylor Avenue through and across the property of said J. W. Lambeth known as "Fair View" in the most direct line to School Avenue, at that point where the said School Avenue crossed Hamby's Creek, the city of Thomasville proposes and agrees to lay out, construct, and run a four (4) inch water main from Main Street down said Taylor Avenue to Ridgecrest Street, placing a hydrant or water plug at the corner of Taylor Avenue and Montilieu Street, and one at the corner of

Taylor Avenue (as it is extended) and Ridge Crest Street. The city of Thomasville also proposes and agrees to extend the city sewer line from the outlet near Hamby's Creek along and up said Taylor Avenue, as it is extended, to the corner of Montilieu Street and Taylor Avenue.

"Second. In consideration of J. W. Lambeth conveying to the city of Thomasville lot No. 1, as is shown on the plat of Fair View property, and paying to the city of Thomasville treasurer the sum of one hundred and twenty-five dollars, the city of Thomasville proposes and agrees to extend both the water and sewer lines of the city of Thomasville, from the corner of Montilieu Street and Taylor Avenue up and along Montilieu Street to the corner of Fifth Avenue and Montilieu Street, and place a hydrant or fire plug at said corner."

The following issues were submitted:

"1. Did the plaintiff and defendant enter into the contract, as alleged in the complaint? Answer: 'Yes.'

"2. Did defendant fail to perform said contract? Answer: 'Yes.'

"3. What damages, if any, is plaintiff entitled to recover? Answer: '$1,000.'"

Defendant appealed.

H. R. Kyser, Phillips & Bower and Raper & Raper for plaintiff.
B. B. Vinson, J. F. Spruill and J. R. McCrary for defendant.

BROWN, J. The power of the defendant to enter into the contract sued upon does not seem to be denied, at least it is not raised by any assignment of error or discussed in the defendant's brief. The term *ultra vires* is used to designate the acts of corporations beyond the scope of their powers as defined by their charters or acts of incorporation. Such lack of power upon the part of the defendant is not pleaded, and the charter of the defendant is not in the record. We therefore assume that the defendant is vested with the usual authority given to cities and towns to lay out streets and to construct sewers and water mains and other municipal conveniences and necessities within the corporate limits of the city. Assuming that the defendant city has the usual corporate authority generally accorded to municipalities, we conclude that the defendant had power to enter into the contract sued on.

The evidence tends to prove that plaintiff owned a tract of land in the city near its center and adjoining the graded school grounds.

He had plat of same made, subdividing into about forty-two lots, laying off streets.

He applied to the board of aldermen to have water lines and sewer lines placed along the streets of the property, so that the purchasers of the lots might have access to those necessities.

The city desired to acquire one of the lots of plaintiff for enlargement of its school grounds, and desired to extend one of the city streets across plaintiff's lands, and to take sufficient lands for the extended street.

Whereupon, the contract set out above was entered into between the plaintiff and the defendant on 26 March, 1917.

Under the terms of the contract, the city acquired by deed, which was afterwards executed, the lot it desired, and the land for the extension of the street it sought, and for a sidewalk along same, and immediately took possession of the lot, and opened up the street through plaintiff's land.

The evidence shows that the defendant failed to carry out its contract until after the action was brought, and after the sale of the lands hereinafter mentioned. The plaintiff made repeated demands on defendant to comply with the contract, and filed its claim for damage in writing for breach of it.

In September, 1918, after repeated notice to defendants, plaintiff offered his lots for sale at public auction, and sold them.

The damage sought is the loss sustained on account of defendant's failure to carry out and perform the contract, alleging that the lots would have sold for a much greater price, if defendant had performed its contract.

The damage sought is the loss sustained on account of defendant's failure to carry out and perform the contract, alleging that the lots would have sold for a much greater price if defendant had performed its contract.

The defendant does not deny the contract, but seeks to excuse itself for failure to comply, on account of war conditions, and also contends that it did put in water and sewer lines, after the sale by the plaintiff. Defendant also contends that at time of sale a load of sewer pipe was scattered around on the ground, and after about six lots had been sold, the mayor announced at sale that the city was under contract to put in water and sewer.

We are of opinion that under the above evidence the motion to nonsuit was properly overruled.

Upon the question of damages, his Honor charged the jury: "As a basis for this damage, the court charges you that it would be the difference which the plaintiff has satisfied you by the greater weight or preponderance of the evidence, as between the actual market value of the land without the water main and sewer connection and hydrant, and what would have been the actual market value of the land with the water main, sewer pipes, and hydrant installed, the burden being upon the plaintiff to satisfy you by the greater weight and preponderance of the evidence of these facts and circumstances."

We think the rule of damages laid down by his Honor is correct. It is not a question of recovery of speculative profits which cannot be measured by any rule of reasonable certainty. The value of the land may always be proven by opinion evidence properly qualified, and the difference between its value without the sewerage and the water, and with it may also be proven by the opinion of those witnesses who are qualified to speak from experience and observation. Absolute certainty is not required, but the amount of the loss must be shown with some reasonable certainty. Substantial damages may be recovered, though plaintiff can give his loss only approximately. Sutherland on Damages (4 ed.), sec. 70, secs. 867-870. The opinion of witnesses who have opportunity to know, and have by such opportunities qualified themselves to testify, has always been received as to values and damages. *Wyatt v. R. R.,* 156 N. C., 307; *Whitfield v. Lumber Co.,* 152 N. C., 211; *Davenport v. R. R.,* 148 N. C., 287; *Wade v. Tel. Co.,* 147 N. C., 219; *Wilkinson v. Dunbar,* 149 N. C., 20; *R. R. v. Church,* 104 N. C., 525.

The contention of the defendant that at the time of the sale there was a load of sewer pipe on the ground, and that the mayor announced after six lots had been sold that the city was under contract to put in water and sewerage, was put to the jury very clearly by the learned judge in these words:

"The plaintiff contends that the promise of the mayor was not received by the people there assembled and taken as if the work had actually been done. The plaintiff contends that this matter had dragged along from time to time for many months. The plaintiff contends that at least 18 months had elapsed from the time that the contract was made up until the present, and that it was apparent for any one to see that no effort was made to complete the contract, and that there was nothing there to assure that the statement of the mayor and promise would be carried out except a wagon load of tiling that was scattered about on different parts of the grounds, and the plaintiff contends that these facts were obvious."

The fact that there was no time limit fixed in the contract within which the water and sewerage was to be put in the street does not prevent a recovery. In such contracts it is well settled that if the party fails in the performance of it within a reasonable time, recovery of damages for breach may be had. In Ruling Case Law the rule is laid down "that a reasonable time for performance is implied in a contract which expresses no time for performance." 6 R. C. L., p. 896. What is a reasonable time within which an act is to be performed when a contract is silent upon the subject must depend on the situation of the parties and the subject-matter of the contract, and it is proper to consider all the circumstances attending the performance, together with the circum-

stances surrounding the parties at the time. While the question of reasonable time is generally one of law, yet under the circumstances of this case we think the judge very properly left it to the jury. The charge in this case is very full and lucid, and presented the whole case to the jury so clearly that they could not fail to understand the issues submitted to them.

Affirmed.

CHESTER D. TURNER ET AL. v. SOUTHEASTERN GRAIN AND LIVESTOCK COMPANY ET AL.

(Filed 21 April, 1920.)

1. Evidence—Admission—Title to Lands—Judgments—Appeal and Error.

Where, during the admission of evidence in the course of the trial involving title to several tracts of land, the plaintiff solemnly admits the title in the defendant to one of the tracts, and makes no claim that it was through inadvertence or mistake, or that it was not in accordance with the truth, he will be bound by his admission, and his exception to the judgment upon the ground that the trial judge had not permitted him to withdraw his admission, will not be sustained on appeal.

2. Pleadings—Counterclaim—Independent Action—Lands—Title—Possession—Equity.

Where the plaintiff alleges the ownership of several tracts of land in controversy and the defendant alleges that he is the owner and in possession thereof, without further allegations entitling him to any equitable relief, or claim amounting to a cloud upon his title, the answer does not raise a counterclaim requiring the plaintiff to reply, or entitling the defendant to judgment for plaintiff's failure to have done so, the test of a counterclaim being whether the allegations are sufficient for the defendant to have maintained an independent action thereon.

APPEAL by both parties from *Connor, J.*, at the February Term, 1920, of CRAVEN.

This is an action to recover land.

The plaintiffs filed their complaint alleging the ownership of the land and the defendants filed answer denying the material allegations of the complaint, and pleading as a counterclaim the following:

"24. That they were at the time of bringing this action, and are now, the owners in fee simple and in possession of the land claimed by the plaintiffs, and they plead said ownership as a counterclaim; wherefore, defendants demand judgment that they go without day as to plaintiffs' claim, and that they be adjudged the owners in fee simple of the lands claimed by plaintiffs, and that they recover cost and have general relief."

The plaintiffs failed to file a reply to the answer, and the defendants moved for judgment upon the alleged counterclaim for want of a reply, which was refused, and the defendants excepted.

During the progress of the introduction of evidence the plaintiff solemnly admitted in open court that the defendants were the owners in fee simple and in possession of the home tract No. 1 described in the deed, a certified copy of which was then and there introduced by the plaintiffs from Wm. M. Jones, surviving executor of Lawrence J. Haughton, deceased, and others, to C. E. Foy, J. W. Stewart, T. A. Uzzell, and W. S. Chadwick, dated 15 October, 1912, and registered in the office of the register of deeds of Jones County, North Carolina, in Book 60, page 396, and particularly described in said deed, containing 7,850 acres, more or less. And said admission was taken down in a very short form by the official court stenographer at the time the same was made a solemn admission of the plaintiffs in the course of the trial, and in the judgment entered it was adjudged on said admission and the reference to the same matter in the consolidated complaint that the defendants had title to and were in possession of said tract of land to which said admission referred.

During said term of the court, and some days after the trial of said cause in which his Honor had directed that a judgment as of nonsuit be drawn as to all the remaining matters involved in plaintiff's complaint, plaintiffs in open court gave a general notice of appeal, and had entry made affecting the same. The court had up till this time held open the matter of signing the judgment at the request of the plaintiffs, so that they might consider the matter involved and confer with such counsel as they saw fit. Later during the term his Honor signed the judgment set out in the record and also signed the statement of the case on appeal of defendants set out in the record of defendants' appeal.

At said time plaintiffs' counsel appeared in open court and stated that he wished all of his entries as to the appeal and notice of appeal that had been entered stricken out, and it was so ordered, and stated that he would rely upon the notice of appeal in writing to be served by him, and that he did not desire to appeal from so much of the judgment as granted a nonsuit against the plaintiffs, but only from that part adjudging the defendants the owners of said tract No. 1 in said deed from Wm. M. Jones, executor, and others, to C. E. Foy, J. W. Stewart, T. A. Uzzell, and W. S. Chadwick, and that he then there desired to repudiate said admission. His Honor later refused to permit him to repudiate it, and entered up judgment.

It was adjudged by the court that the defendants were the owners of the land covered by admissions of the plaintiffs, and that the plaintiffs be nonsuited as to the remainder of the land.

Both the plaintiffs and the defendants appealed from the judgment.

The plaintiffs assign as error his Honor's rendering judgment in favor of the defendants for the 7,850-acre, more or less, tract of land described in exception 1 above.

The defendants assign as error the failure to enter judgment in their behalf for all of the land described in the complaint, because of the failure of the plaintiffs to file a reply.

Frank Nash and C. D. Turner for plaintiffs.

D. L. Ward, T. D. Warren, Guion & Guion, Moore & Dunn, and Ward & Ward for defendants.

ALLEN, J. The plaintiffs do not note any exception in the record to the refusal of his Honor to strike out the admission solemnly made, and the only question therefore presented by their appeal is whether the admission, which it is not alleged was inadvertently made, or by mistake, or that it is not according to the truth, is sufficient to sustain the judgment.

It has been long recognized with us that admissions made by counsel during the progress of a cause, and to facilitate the trial, are binding upon the parties, and if this were not so, much time would be consumed in proving facts about which there is no controversy.

It not infrequently happens in the course of an action to try the title to land that the plaintiff introduces a great number of deeds in his chain of title in which the descriptions are not always identical, and that the defendant's counsel, knowing that the deeds cover the land, do not require proof of identification, and in this way much time can be saved, and so it is in the trial of other actions.

In *Fleming v. R. R.,* 115 N. C., 693, the Court says of admissions equally as important as the one made in this case:

"When two of the counsel for the defendant admitted in the progress of the trial, on behalf of their client, that the plaintiffs owned and were possessed of the land, it was not error in the court to instruct the jury to respond in the affirmative to the first issue, involving the question of title and possession. In the same way, counsel were bound by their admission that 'Great Swamp was a natural watercourse and drain for said land,' and were not at liberty, after the trial, to except to the instruction to the jury to write the response, in accordance with their express agreement.

"The same principle applies to the consent of counsel given 'in open court, at the close of the charge, that the jury need not respond to each amount of damage separately, if more than one cause of damage was found to exist, but that they might find the aggregate amount for all causes, and respond only to the ninth issue on that question.' "

Again, in *Lumber Co. v. Lumber Co.*, 137 N. C., 438: "Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings, especially when they are solemnly made and entered into and are committed to writing, and when, too, they bear directly upon the matters involved in the suit. Such agreements and admissions are of frequent occurrence and of great value, as they dispense with proof and save time in the trial of causes. The courts recognize and enforce them, as substitutes for legal proof, and there is no good reason why they should not. 'Admissions of attorneys bind their clients in all matters relating to the progress and trial of the cause, and are, in general, conclusive.' 1 Greenleaf on Ev., 186. 'Unless a clear case of mistake is made out, entitling the party to relief, he is held to the admission, which the court will proceed to act upon, not as the truth in the abstract, but as a formula for the solution of the particular problem before it, namely, the case in judgment, without injury to the general administration of justice.' *Ibid.*, 206; Wharton on Ev., 1184, 1185, and 1186."

We are, therefore, of opinion that there is no error on the plaintiffs' appeal.

The defendants' appeal presents the simple question as to whether the allegations of the defendant in the answer that they are the owners of the land in controversy and in possession thereof constitute a counterclaim, because if it is a counterclaim it was the duty of the plaintiffs to file a reply thereto, and upon failure to do so the defendants would be entitled to judgment for want of a reply.

"The criterion for determining whether a defense set up can be maintained as a counterclaim is to see if the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if it does, then such cause of action is a counterclaim: and it must disclose such a state of facts as would entitle the defendant to his action, as if he was plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and, like it, contain a plain and concise statement of the facts constituting a cause of action." *Garrett v. Love*, 89 N. C., 207.

Again, in *Askew v. Koonce*, 118 N. C., 531, it is said: "Unless a defendant has some matter existing in his favor and against the plaintiff, on which he could maintain an independent action, such claim would not be a counterclaim."

Tested by this rule, we are of opinion that the defendants have not alleged a counterclaim.

If they had instituted an independent action alleging simply that they were the owners of the land and in possession it would have been the duty of the court to enter judgment of nonsuit, because if they owned the

land and were in possession, nothing else appearing, they had no cause of complaint.

The case would be different if, as in *Roper Lumber Co. v. Wallace,* 93 N. C., 23, and in *Yellowday v. Perkinson,* 167 N. C., 147, there were allegations entitling the defendants to equitable relief, or if it had been alleged that the plaintiffs were setting up a claim which amounted to a cloud upon their title, but none of these allegations appear in the answer, and as they are relying upon the letter of the law they must abide by it.

Affirmed on both appeals.

The plaintiffs will pay the costs on the plaintiffs' appeal, and the defendants the costs on the defendants' appeal.

J. O. GAULDIN, ADMINISTRATOR OF BESSIE VIRGINIA GAULDIN, v. THE TOWN OF MADISON.

(Filed 21 April, 1920.)

1. Evidence—Records—Courts—Burden of Proof—Trials.

Where a record in a former action is relevant in the present one, the record itself is the only evidence admissible to prove its contents, unless it is shown by the party desiring it, with the burden of proof on him, that it once existed and has been lost, or having existed it cannot be produced.

2. Same—Limitation of Actions—Pleadings—Nonsuit.

Where a judgment by default for the want of an answer has been entered, and a motion to set it aside has been made, and it is necessary for the plaintiff in the present action to recover for a wrongful death, to repel the bar of the statute by showing that the causes of action were the same, and that suit had been commenced within a year, any evidence of what the complaint would have set forth, had it been filed, including affidavits used in the motion to set the former judgment aside, is incompetent.

CIVIL ACTION, tried before *McElroy, J.,* and a jury, at November Term, 1919, of ROCKINGHAM.

This suit was brought to recover damages upon the allegation that the defendant had negligently caused the death of the plaintiff's intestate by a defect in one of its streets, known as Water Street, at its junction with the bridge over the Dan River, the deceased having been thrown violently from the buggy in which she was riding, resulting in injuries to her person from which she died on 22 August, 1914. Defendant denied that it had been guilty of negligence, pleaded contributory negligence, and specially set up as a defense that the death of plaintiff's

intestate occurred on 22 August, 1914, and this action was commenced more than one year from the said death. Plaintiff replied, admitting that this action was commenced on 19 October, 1916, more than one year after his intestate's death, but alleging that an action was previously commenced by summons which was issued on 16 August, 1915, and served on 20 August, 1915, it being returnable to November term of the Superior Court of Rockingham County. That the said action was, on motion of the defendant therein, dismissed by the court on the last day of November Term, 1919 (4 December, 1919), for failure to file a complaint. That, at the next term of the court the plaintiff moved to set aside the judgment of dismissal upon affidavit alleging that the former action "was based upon a claim for damages for the wrongful death of Bessie Virginia Gauldin, caused by a defect in the street of said town of Madison." The motion was denied by Judge Webb, then presiding, and no appeal was taken. Summons was issued in the present action, 19 October, 1916, and served 1 November, 1916.

At the trial of the present action the court below excluded the said affidavit and the judgment or order of Judge Webb, and all other evidence offered by plaintiff for the purpose of identifying the present with the former action, in order to repel the effect of the statute, that a suit to recover damages for death by wrongful act shall be brought within one year after the death. Upon the exclusion of all available and existing evidence offered by plaintiff to carry the burden of the issue as to the bar of the statute he submitted to a nonsuit and appealed.

Douglas & Douglass, J. R. Joyce, J. M. Sharp, and R. M. Robinson for plaintiff.

C. O. McMichael, J. C. Brown, and Manly, Hendren & Womble for defendant.

WALKER, J., after stating the material facts as above: The plaintiff contends that the affidavit of Mr. J. R. Joyce, filed by him, and upon which he based his motion to set aside the former judgment, was competent to prove the cause of action in the first suit in order to repel the bar of the statute, by showing the identity of the cause of action in this case with that in the former suit, and that the court erred in excluding it. We do not agree with the contention, and hold, to the contrary, that the court was right in its decision upon the question. No pleading was filed in the first action, and the only way that we know of to show what the cause of action was, is by the production of the complaint itself or a duly certified copy thereof. The complaint itself is the *only* evidence of the cause of action alleged, or *intended* to be alleged. Nothing else can prove it, or, as has so often been held by this Court, a record is the

only proof of itself, which the law will hear. The precise question was raised and decided in *Bryan v. Malloy,* 90 N. C., 508, where a suit was brought and no complaint, or other pleading filed, but a deposition was taken by the plaintiff and remained on file. Both parties were present when the deposition was taken, but it was never read or offered in evidence. The first action was nonsuited. A second suit was brought, but no complaint was filed, and it was attempted to be shown in the pending action by the oral examination of the plaintiff in that action what was the cause of action therein. This evidence was excluded. The defendant then in the pending action, in which pleadings had been filed, submitted to a nonsuit and appealed. This Court sustained all the rulings. The Court, after a clear discussion of the matter by *Justice Ashe,* closed with these words: "The principle established in these adjudications is that parol proof is admissible, and only admissible in aid of the record; that is, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is competent for the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had, and to support it by proof. But there must be a record to be aided. When there is no record, as in our case, there is no foundation for the proof."

In the later case of *Tomlinson v. Bennett,* 145 N. C., 279, the Court referring to the passage just taken from *Judge Ashe's* opinion says: "The learned justice used the word 'record' as synonymous with 'pleading.'" *Justice Connor* further says in the *Tomlinson case, supra:* "Plaintiff encounters another difficulty: How is the Court to know what the defendant, the plaintiff in this action, would have alleged therein as his cause of action? We do not think parol evidence would be competent to show what a plaintiff would have alleged in a complaint which was never filed. . . . The only record here is a summons; no complaint; no answer; no issue, and no verdict—only a judgment of nonsuit, which in that case means a *nolle prosequi.*" Concluding the discussion, and referring to the class of cases in which parol evidence is admissible to make more specific the issues decided in a former action, the learned justice proceeds to the review of *Bryan v. Malloy, supra,* and says that *Justice Ashe* states the correct rule in that case, which is, that the court will not admit any evidence to prove a record other than the record itself, unless that once existed and has been lost, or having existed, cannot be produced, and the burden of showing this rests upon the party relying upon the record. It would seem that this is sufficient authority to sustain a proposition so universally recognized as law, that the best and only proof of a record is by the record, as in no other mode can we be properly advised. But there is unlimited authority to sustain it. *Comrs. v. Packing Co.,* 135 N. C., 62-68; *Rollins v. Wicker,* 154

N. C., 559; *Wade v. Odeneal,* 14 N. C., 423; Hughes on Procedure, pp. 14 and 749; *Munday v. Vail,* 34 N. J. L., 418; *Mondel v. Steel,* 8 Mess. & W. 858. A judicial record is neither to be originally created, nor can it be increased or diminished by averment out of or beyond that record. Hughes on Procedure, p. 749; 17 Cyc., 497, 567, 571; *Dimick v. Brooks,* 21 Vt., 578. In *Wade v. Odeneal, supra, Ruffin, J.,* said: "The question is, how this judgment is to be proved. Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. . . . The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established."

In *Rollins v. Wicker, supra,* where the plaintiff proposed to set up a record by parol evidence, which was excluded, the Court said: "The ruling was correct. That was not the way to prove the fact, even if the evidence was otherwise competent. The record itself is the primary and only competent proof of its contents, unless it has been lost or destroyed, and there was no suggestion that it had been."

A careful scrutiny of the authorities appears to show that no principle in the law of evidence is more universally accepted as the only correct one as that which excludes parol evidence to show what a pleading would, perhaps, have been if it had been filed. It must seem to be clear, apart from precedent, that a cause of action should be shown only by the complaint itself. Any other doctrine would be unsafe, without the support of a single sound reason and would be palpably wrong.

The rule is thus tersely, and aptly, stated in 17 Cyc., 504: "It is generally held that the proceedings, judgments, and decrees of courts of record can be proven only by the record itself or a properly authenticated copy thereof, and that, if no record of such matters has ever been made, the absence of the record cannot be supplied by parol or other extrinsic evidence; the rule whereby secondary evidence is admitted as to lost or destroyed records not being applicable."

Dr. Thayer says, in his excellent treatise of Evidence, at p. 390, that, according to the modern and better view, the parol evidence rule is not merely one of evidence, but of substantive law. Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it shall not be shown other than in one certain way, and everything, whether oral or in writing, which is extrinsic to the method prescribed is excluded. Greenleaf on Evidence (16 ed.), sec. 350; *Pitcairn v. Phillip Hess Co.,* 125 Fed. Rep., 110, 113.

In 10 R. C. L., sec. 329, p. 1121, we find it stated that, "A judgment and the proceedings in the case in which it has been rendered are prop-

erly proved by the record itself, or by a certified copy. Indeed, except in case of the loss or destruction of the record, it cannot be proved otherwise than by the original, or by a duly authenticated copy."

And in 23 R. C. L., at sec. 7, p. 158: "The acts of a court of record are known by its record alone, and cannot be established by parol testimony." It is manifest, therefore, that the affidavit of Mr. Joyce, and the findings in Judge Webb's order refusing to set aside the judgment of nonsuit in the first action, should not, and cannot, be made proof of the record in this case, nor can they be used to import into that record anything not already therein. The rule admitting only the record to prove itself, or its contents, applies only to such matters as originally and legitimately were in the record, and the record cannot be made, or originated by mere collateral proceedings. They are not in any correct or proper sense proof of the original record. 17 Cyc., 304. The rule excluding parol evidence to supply a pleading never filed, or to read into any part of the record that which was omitted, and never, in fact, existed as a part of it, cannot be avoided by a mere form. The law refuses to receive any kind of evidence except the record to establish what it is. Besides, the affidavit does not profess to say that there ever was a record, that is, a pleading filed, corresponding in kind to its allegations as to the cause of action, and all it really does state, in effect, is that plaintiff intended to file such a complaint, but did not do so. This is very far from complying with the rule, and if we should allow such procedure we would be deciding against all precedent and authority. Judge Webb only stated that plaintiff claims that the former case was one to recover damages for the death of his intestate, and that is all he could find upon the evidence.

Unless, at the time the suit was dismissed, there appeared in the record of it, and in the proper way a statement of the nature of the plaintiff's cause of action, there is now no way for plaintiff to show what, in fact, it was, because the law has declared that there has been provided a way for him to disclose the nature of his cause of action, and if that way is not followed there is no other way open to him. The way prescribed is a complaint. *Tomlinson v. Bennett,* 145 N. C., 279. The doctrine of the courts in respect to the proof of judicial records is thus well stated by *Justice Wayne,* in *Weatherhead's Lessee v. Bakerville,* 11 Howard (U. S.), 329, (13 L. Ed., 717): "The rule in respect to judicial records is that, before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record, that it has been lost or destroyed, or is otherwise incapable of being produced; or that its mutilation from time or accident has made it illegible. In this last, though, not without the production of the original in the condition in which it may be."

A lost record, or pleading, or other part of the record, may be shown by parol, but before even this can be done it must be shown that the instrument *once* existed. This is the essential first proof. *Improvement and R. Co. v. Munson,* 14 Wallace (U. S.), 442-449 (20 L. Ed., pp. 867, 872); *Bouldin v. Massie's Heirs,* 7 Wheaton (U. S.), 122 (5 L. Ed., 414). You cannot even show by parol testimony the contents of a record or document until you have established its former existence and its loss, or the impossibility of producing it.

We discussed fully, in *Person v. Roberts,* 159 N. C., 168, the question as to the competency of parol evidence to show what was the cause of action in a prior suit, when no complaint had been filed, and reached the same conclusion as we have in this case. It was there said: "It appears that a former suit was brought, but no complaint filed, and plaintiffs were permitted to show by parol what was the cause of action in that case, for the purpose, we presume, of rebutting the defense of the statute of limitations, or, to be more exact, the claim of title by adverse possession. If it had been material to show that the two actions were for the same cause, and the same relief, the ruling would be erroneous. The point was decided against the contention of the plaintiffs in *Bryan v. Malloy,* 90 N. C., 508, in which *Justice Ashe* says: 'Verdicts, judgments, depositions in a former cause, and the former testimony of deceased witnesses are considered as resting on the same principle. . . . The plaintiffs offered parol evidence to show that the action was brought to set aside the deed made by the Sinclairs to Kennedy. But his Honor excluded the evidence and the deposition taken in the cause.' "

The ruling in *Bryan v. Malloy, supra,* was approved as appears from the above passage taken from the opinion of the Court. The case of *Person v. Roberts* was practically identical with this one, and, at least, sufficiently so to control the present decision. If the deposition was not competent in *Bryan v. Malloy,* which indicated what would have been the cause of action if a complaint had been filed, we fail to perceive how an affidavit filed in a collateral proceeding to set aside the judgment by default can possibly be admitted to show the cause of action in the case.

The plaintiff, in order to avoid the condition of the statute giving an action for death caused by wrongful act, that it shall be brought within one year after the death, has tried to prove the impossible, which is, that he brought a former action for the same cause within one year after the death of the intestate, when it affirmatively appears, and is not denied, that no complaint was ever filed in the former suit, which could be the only proof of his allegation. In other words, that he can prove an essential fact by something that never existed. *Bryan v. Malloy, supra,* and other cases we have cited to the like effect.

What is said herein does not affect the power of the court to amend its record in any manner necessary to make it speak the truth or to supply a missing record in a proper case. That rule implies, as we have said, that a record, or an entry was ordered to be made which by inadvertence was not made, or by clerical or other mistake or mishap an entry was not made as ordered, and other similar cases.

Judge McElroy was right when he intimated against the plaintiff, and drove him to the nonsuit from which he appealed.

No error.

W. E. MILLER v. MELTON-RHODES COMPANY, INC.

(Filed 21 April, 1920.)

1. Evidence—Former Trial—Parties—Substantive Evidence—Instructions Corroboration—Impeachment.

Testimony of a party given on a former trial in contradiction of his evidence of a material fact on the second one, may be received as substantive evidence, and it is reversible error for the trial judge to charge the jury that they could only regard it in corroboration or impeachment.

2. Negligence—Evidence—Trials—Nonsuit—Questions for Jury.

In this case it is *Held* that there was sufficient evidence for the determination of the jury upon the issue of defendant's actionable negligence in causing a personal injury to the plaintiff, an employee, for failure of its duty to instruct him in the use of a power driven machine and to furnish him a machine that was known, approved, and in general use for like purposes, etc.

APPEAL by defendant from *Bryson, J.*, at the November Term, 1919, of GUILFORD.

This is an action to recover damages for personal injury, the plaintiff alleging that he was injured by the negligence of the defendant in the following particulars:

"(a) In that the defendant negligently and carelessly failed to properly instruct the plaintiff as to the safe and proper manner of operating said machine.

"(b) In that it carelessly and negligently failed to provide said machine with a lever so that the plaintiff, while operating said machine, could cut off the motive power if necessary.

"(c) In that the said defendant negligently and carelessly failed to equip the said machine with a guard over the saw upon said machine, such as is approved and in general use upon machines of like character.

"(d) In that the said defendant carelessly and negligently permitted a certain slot in said machine to remain open while the plaintiff was operating the said machine, such slot having caught the material hereinbefore referred to, which acts of negligence on the part of the said defendant were the proximate cause of plaintiff's injury."

At the time of the injury the plaintiff was operating a rip saw for the defendant. He had not worked at that machine before that time. He was ordered by the foreman of the defendant to cut some materials, and under his instructions went to the basement of the building to throw the belt on the shafting. When he returned the foreman was gone and the machine was running.

He offered evidence tending to prove that no instructions were given to him as to the operation of the machine, and that when he undertook to put a piece of material through the machine it was caught therein, and that the plaintiff started in another piece to force the first piece through; that this piece also lodged, and he then tried to force it through by using a small stick; that there was a slot open in the machine, but that the plaintiff did not know this; that he did not know that there was a lever which controlled the machine, and by which it could be stopped, and that while attempting to force the timber through his hand was thrown on the unguarded saw and he was severely injured.

The plaintiff was examined as a witness in his own behalf, and, among other things, he testified: "I did not discover where the lever was until after I was injured."

The defendant offered evidence tending to show that there was no negligence, and, among other things, introduced the examination of the plaintiff on a former trial in which appears, among other things, the following question and answer:

"Q. So you say you know where the power lever was, but it would have been too much bother to go around there, and you thought you would get the piece out with your stick, with another stick? A. Yes, sir; I thought it could be gotten out quickly."

There were other facts stated in this examination tending to prove the contention of the defendant.

When this examination was introduced by the defendant his Honor instructed the jury that "this testimony is introduced and allowed to be introduced, and is to be considered by you as either tending to corroborate or impeach the testimony of the witness Miller given in this action on a former trial. It shall not be construed by you as substantive testimony, but only as corroborating or impeaching the witness Miller," and the defendant excepted.

There was motion for judgment of nonsuit, which was overruled, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Wilson & Frazier for plaintiff.
Shuping, Hobbs & Davis and Charles A. Hines for defendant.

ALLEN, J. His Honor was in error in restricting the examination of the plaintiff Miller upon the former trial to the purpose of corroboration and impeachment, and he was doubtless misled by not taking into consideration that it was the examination of a party and not of an involuntary witness.

"Statements contained in the evidence given by a party as a witness or adopted by him are primary in their nature and constitute informal judicial admissions which affect the party not only in the trial where given, but in any other hearing of the suit even upon appeal." Chamberlain on Evidence, vol. 2, sec. 1268.

The principle applicable to the evidence of a witness, and of a party is tersely stated in *Medlin v. Board of Education,* 167 N. C., 241, where the Court says: "Evidence of contradictory statements are not substantive evidence, but merely impeaching testimony, unless it is an admission by a party in interest."

One of the important facts upon this trial was whether the plaintiff knew of the existence of the lever and of its use, and whether it was placed so that it could be reached by him, and the defendant was entitled to have the jury consider his statement as to this and other relevant facts made during his examination on the former trial as substantive evidence.

There is therefore error which entitles the defendant to a new trial.

We have carefully considered the record, and are of opinion that there is evidence of negligence which the jury ought to be permitted to consider, and that the motion for judgment of nonsuit was properly overruled.

New trial.

J. M. W. FRISBEE v. D. F. COLE.

(Filed 21 April, 1920.)

1. Husband and Wife—Deeds and Conveyances—Probate—Statutes—Conclusions—Presumptions—Evidence.

The Statute, Rev., 2107, only requires that the officer taking the probate of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed "is not unreasonable or injurious to her," and it will be conclusively presumed that it was upon sufficient evidence, and

where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud, as other judgments may be" so attacked; as where the purchaser from the husband refuses to accept his deed upon the ground that the husband, having a short time previously conveyed the lands to his wife, her reconveyance was necessarily "unreasonable or injurious to her."

2. Deeds and Conveyances— Acknowledgment— Subsequent Probate— Proof—Husband and Wife.

Where the husband joins with his wife in the execution of a deed to her lands, and it is certified that he had assented thereto at that time, the objection to the probate of the husband that it was taken after his wife's death is untenable, for the probate or acknowledgment is not the execution of the deed, but the proof thereof.

CLARK, C. J., concurring.

CIVIL ACTION, tried before *Webb, J.*, on a case agreed, at February Term, 1920, of BUNCOMBE.

This is a controversy in regard to the title of land arising out of the sale of the same by the plaintiff to the defendant. The tract contains 163 acres, more or less, and the defendant promised to pay for the same the sum of $125 per acre, the number of acres to be ascertained by a survey of the premises, upon the payment of which sum the plaintiff promised to convey to the defendant a good title to the said land free from all liens and incumbrances. Plaintiff was originally owner of the land, and on 10 May, 1898, conveyed it to his wife, R. E. Frisbee, by deed of that date duly proved and registered, and on 10 June, 1898, she conveyed it back to him "for and in consideration of . . . dollars," the amount not being set forth in the deed, and it being agreed that no consideration passed from the plaintiff to his wife for the last mentioned deed. The deed from his wife to plaintiff was jointly executed by him with her, and witnessed by R. E. Wells, and was proved, and afterwards registered, upon the following certificate of the clerk of the Superior Court of Buncombe County, where the land is situated on the waters of Turkey and Newfound creeks:

North Carolina—County of Buncombe.

I, J. L. Cathey, clerk of the Superior Court of Buncombe County, do hereby certify that R. E. Frisbee (and her husband, J. M. Frisbee, consenting thereto in writing as heretofore appears) personally appeared before me this day and acknowledged the due execution by her of the foregoing deed, the said R. E. Frisbee being by me examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and

that she still voluntarily assents thereto, and it appearing to the undersigned clerk that same is not unreasonable or injurious to the said R. E. Frisbee, and all things appearing to the satisfaction of the undersigned clerk, it is adjudged that the foregoing is not unreasonable or injurious to the said R. E. Frisbee. Therefore, let the same, with this certificate, be registered. This 9 June, 1898. J. L. CATHEY,
Clerk of the Superior Court of Buncombe County, N. C.

State of North Carolina—County of Buncombe.

The due execution of the foregoing instrument by J. M. Frisbee was this day proven before me by the oath and examination of R. M. Wells, the subscribing witness thereto. Let said instrument and this certificate be registered.

Dated 26 January, 1920. JOHN H. CATHEY,
Clerk of the Superior Court of Buncombe County, N. C.

North Carolina—Buncombe County.

I, J. H. Cathey, clerk of the Superior Court, hereby certify that J. M. Frisbee this day personally appeared before me and acknowledged the due execution by him of the foregoing instrument. Let the same with this certificate be registered. This 26 January, 1920.

JOHN H. CATHEY,
Clerk Superior Court, Buncombe County, N. C.

The last two proofs were taken and the last two certificates were made several years after the death of Mrs. Frisbee.

Defendant resisted recovery of the purchase money and the performance of the contract of sale on the ground that plaintiff could not convey a good and indefeasible title because there being no consideration for the deed from R. E. Frisbee to the plaintiff, the deed to the husband was necessarily injurious to her, and notwithstanding the certificate of the clerk that it was not unreasonable or injurious to her, the deed was void as to her, and the plaintiff, her husband, acquired no title to the land, and therefore could not pass a good title to the defendant as he contracted to do. The court, Judge Webb presiding, was of the opinion that the deed was valid, and that the plaintiff could comply with his contract, and so held and gave judgment for $20,750, the amount due. Defendant appealed.

Zeb F. Curtis and Harkins & Van Winkle for plaintiff.
Martin, Rollins & Wright for defendant.

WALKER, J., after stating the facts as above: We do not see that the cases cited by the learned counsel for the defendant militate at all against

our view of this case, which agrees with that of the learned judge who presided at the trial. These cases are *Sims v. Ray,* 96 N. C., 87; *Rea v. Rea.,* 156 N. C., 529; *Archbell v. Archbell,* 158 N. C., 408; *Singleton v. Cherry,* 168 N. C., 402; *Butler v. Butler,* 169 N. C., 584. They were cited by the defendant for the position that the deed of a married woman is void, unless the probate of the deed and the privy examination of the wife are properly taken under Rev., 2107, and upon inquiry of the officer taking the same it shall appear, as further required by said section, that the contract or deed is not unreasonable or injurious to her. The section further provides that "the certificate of the officer shall state his conclusion, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be." In this case there is no direct attack upon the certificate of the clerk attached to Mrs. Frisbee's deed, nor is there any suggestion or intimation of fraud or collusion or other fact sufficient to set it aside. The complaint simply states that plaintiff made the contract of sale with the defendant, and is ready, able, and willing to comply with it, and that defendant has failed and refused to do so, and demands judgment for the amount of the purchase money. The defendant, in his answer, admits the contract but denies that plaintiff is the owner of the lands, and is able, ready, and willing to give him a good title thereto. There is no direct attack in the pleadings upon the certificate of the clerk. The assault, as appears, is not on the certificate as having been fraudulently or collusively obtained, but is upon the finding of the clerk, that the deed is not unreasonable or injurious to Mrs. Frisbee. This is based upon the admission of the parties that there was no consideration for the deed. But is this sufficient to annul the finding of the clerk as contained in his certificate, when the inquiry as to the facts was properly conducted, and the adjudication and certificate of the clerk, as to them, were regularly made? We are of the opinion, as was the learned judge, that it is not. The statute itself expressly declares that the clerk shall state his conclusions, but not the evidence upon which they were based, and that his findings shall be conclusive, but may be impeached for fraud as other judgments may be. It, therefore, must be seen that, according to the statute, the defendant cannot avoid the clerk's certificate in the collateral way he has adopted, and that it must stand for the truth until it is properly impeached and set aside. It would not do to permit an attack upon the certificate, or any finding in it, by extraneous evidence which was not brought forward for the purpose until many years had elapsed since it was made by the clerk. It was a most solemn adjudication by him, and presumably upon ample evidence to warrant his conclusion, which should not be contradicted or set at naught by any such irregular and unauthorized method. The proceeding to set aside this record

should, at least, be as solemn as the one which made it. But we have the authority of this Court to the same effect. *Wynne v. Small,* 102 N. C., 133-136, which involved the validity of a married woman's deed, and the legal effect of the clerk's certificate, *Chief Justice Smith* said: "It is true that the certificate, while it retains its form, from the verity attaching to it as such, must be accepted, when it comes up collaterally, and its recitals cannot be disproved, nor its omissions supplied by extraneous proof." Any record, as he says, may be amended to make it speak the truth, when something was omitted by inadvertence, which was really a part of the record. But that is not the question here. It is merely attempted to contradict the record by evidence *dehors,* and that, too, when it does not appear whether that evidence was before the clerk. If it was not before him, it is too late for it to be heard now, if it was before him, then there is no use in offering it at this time, as the presumption is that he gave it due consideration, and that, notwithstanding, he reached, upon all the circumstances in evidence, the conclusion as stated in his certificate. The evidence upon which he proceeded is not before us, but his conclusions are, and they are presumed to have been based upon sufficient evidence, nothing else appearing, to rebut that presumption.

It appears here that the land now in question was formerly owned by the husband; that he conveyed it to his wife, and she a month afterwards reconveyed it to him, which gives color to the theory that there had been some understanding between them entered into for their joint benefit, by which she was under some obligation to act as she did by executing the deed to her husband, and that the clerk found the arrangement, whatever it was, was not unreasonable or injurious to her. We would not change his finding, if we could do so, without knowing what evidence the clerk had before him. In the absence of such knowledge, we must presume conclusively that his decision was correct. It cannot be reversed simply upon suggestion that he found erroneously, or upon extraneous matter, without first setting aside his judgment for fraud or upon some other legal and adequate ground. While the order or judgment stands, it must be respected as importing verity, as "jurisdiction existing, any order or judgment is conclusive in respect to its own validity, in a dispute concerning any right or title derived through it, or anything done by virtue of its authority." Vanfleet on Collateral Attack, sec. 17, p. 29; *Irvine v. Randolph L. Corporation,* 111 Va., p. 408. The clerk of the court had jurisdiction to hear the evidence and determine therefrom whether the deed would be reasonable and not injurious to the wife, and his judgment is final and conclusive until reversed in proper proceedings for that purpose. The following cases show what the law is in this State with respect to judgments of courts which have general jurisdiction, and

their exemption from collateral attack: *Wade v. Dick,* 36 N. C., 313; *Morris v. Gentry,* 99 N. C., 483; *Beckwith v. Lamb,* 35 N. C., 400; *Marshall v. Fisher,* 46 N. C., 111-115. *Chief Justice Pearson* says for the Court, in *Marshall v. Fisher, supra,* citing *Beckwith v. Lamb,* 35 N. C., 400: "Every court, where the subject-matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there is something on the face of the proceedings to show to the contrary. This must be the rule, unless we adopt the conclusion that the court is unfit for the business which by law is confided to it."

With regard to courts of special or limited jurisdiction, the rule is not so broad as the other which is applicable to those of general jurisdiction, but they also are, to a certain extent, immune from indirect or collateral attack, as will appear from the text-books and decisions. *Justice Hoke* says, in *Fann v. R. R.,* 155 N. C., at margin p. 139: "In this day and time, and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with as orders and decrees of courts of general jurisdiction, and where jurisdiction over the subject-matter of inquiry has been properly acquired, that these orders and decrees are not, as a rule, subject to collateral attack."

Referring to administration on an estate, where the question as to the domicile of the intestate and the place where his assets are as determining the right of administration and the power of the clerk to appoint a personal representative, he further says: "These are the very questions referred to him (the clerk) for decision. But if a person has been selected contrary to the prevailing rules of law, the error must be corrected by proceedings instituted directly for the purpose, and not by a collateral attack on the letters," citing several cases.

It may be, as we have said, and now repeat, that the clerk ascertained and determined from all the facts and circumstances that the conveyance by the husband to the wife, and her reconveyance to him one month afterwards, were acts done in furtherance of an arrangement or agreement between them to advance their joint interests, and that, instead of being injurious, it was reasonable and a distinct advantage to her. We can conceive of circumstances in which she might be benefited. But whatever the nature of the transaction was, we must presume the clerk acted properly, and rightly, instead of improperly and wrongly, as there is no principle which would justify the latter conclusion in a collateral proceeding.

There is nothing in the objection that the probate of the husband was taken after the wife's death. He assented to the conveyance, at the time it was executed, as stated by the clerk in the first certificate made at the

time, and he joined in the execution of the deed with his wife though his acknowledgment of the execution by him was made some time afterwards. The latter is not the execution of the deed by him, but merely the proof thereof, and the taking of it long afterwards, does not affect the validity of the conveyance. Rev., 953.

There was no error in Judge Webb's ruling as to the plaintiff's title. Affirmed.

CLARK, C. J., concurs on the following grounds: The Constitution, Art. X, sec. 6, provides that a married woman shall hold her property in the same manner as if she had remained single, and may devise and bequeath it, and, "with the written assent of her husband, convey it," as if she were unmarried. Even this requirement of the husband's assent has long since been abolished in England, and with rare exceptions by all the States in this country. It is the sole restriction permitted by our State Constitution upon the wife's power to dispose of her own property. If Rev., 2107, extended to conveyances, it would be a violation of that provision of the Constitution by adding the requirement that some third party, a magistrate or other official, must give his wise approval before she can do what the Constitution guarantees that she may do "with the approval of her husband."

In the second place, out of deference to the Constitution, Rev., 2107, does not mention conveyances of realty. That section comes under subhead 3, entitled, "*Contracts* between husband and wife," and an examination of the section shows that it applies only to *contracts.* In *Rea v. Rea,* 156 N. C., 530, it is said: "An examination of section 2107 shows that it applies solely to contracts, and not to conveyances; indeed, the word 'contract' is used 5 times in that section, besides in the heading. The object of the Legislature was clearly to prevent the wife making any contract with her husband whereby she should incur liability against her estate which in future might prove a burden or charge upon it, or cause a charge upon or impairment of her income or personalty. To that end not only a privy examination was required, but the certificate of the magistrate that the contract was not unreasonable or injurious to her. This provision does not attempt to add as to conveyances by her (as to which the act of 1911 retains the constitutional restrictions in regard to realty, that there must be the written assent of the husband and statutory privy examination), any further restriction, such as the approval of a third person. Adding that if it did it would be unconstitutional," *quoted, Butler v. Butler,* 169 N. C., 597.

N. S. CARDWELL v. W. H. GARRISON, W. L. B. GARRISON AND SALLIE J. GARRISON.

(Filed 28 April, 1920.)

1. **Corporations—By-Laws—Shareholders—Notice—Independent Transactions.**

   The principle by which a shareholder in a corporation is bound by a corporate resolution regularly passed pursuant to its charter and by-laws, prevails only in reference to his status and rights as a shareholder and not where he deals independently with it as one of its customers in the line of its business.

2. **Principal and Agent—Bills and Notes—Negotiable Instruments—General Agent—Apparent Authority—Secret Limitations—Corporations—By-Laws—Shareholders—Notice.**

   It is in the scope of the authority of the president of a corporation, in charge of its affairs, implied as agent from his official position and duties, to endorse or transfer notes given to it to purchasers thereof, and where a shareholder therein has become a purchaser of its negotiable notes before maturity, without notice and for a sufficient consideration and the notes have been endorsed or transferred to him by the president thereof, the mere fact that he was a shareholder therein does not fix him with notice that under its by-laws authorized by its charter, only the secretary and treasurer of the corporation was authorized to make the endorsement.

3. **Same—Title—Purchasers for Value.**

   A by-law of a corporation authorizing only its secretary and treasurer to endorse notes held by it to a purchaser is a secret limitation upon the implied or apparent powers of the president to do so, and does not affect the passing of the title to such instrument by the president's endorsement to a purchaser for value, before maturity and without actual notice, though such endorsee be a shareholder in the corporation at that time.

4. **Same—Due Course.**

   A shareholder in a corporation purchased a note held by it before maturity, for value and without actual notice of a by-law requiring that only its secretary and treasurer could make a valid endorsement, and accepted the transfer from its president, for which the company received the consideration or its greater part. *Held*, the purchaser is one in due course, and maintain his action against the makers of the notes and the secret limitation upon the apparent authority of the president of the corporation by its by-laws does not affect his title.

CIVIL ACTION, tried before *Calvert, J.*, and a jury, at January Term, 1920, of ALAMANCE.

The action is to recover the amount purporting to be due on four negotiable promissory notes executed by defendants to the Twin City Monument Company aggregating $1,275 principal money, with interest,

and endorsed by said company to plaintiff for value before maturity, through William P. Sharp, its then president.

There was allegation with evidence on the part of defendant tending to show that these notes were given for shares of stock in said company, and that defendants were induced to sign the same by false and fraudulent representations on the part of said Sharp—defendants contending that this defense was open to defendants as against the plaintiff, who was shown to be a stockholder in the company, and by reason of a resolution passed by the directors in force at the time, requesting that all contracts, checks, or valuable papers should be signed by the secretary and treasurer of the company, and that no order should be valid without such signature.

There were also facts in evidence tending to show that plaintiff had paid in purchase of notes very near the full value of same. That the company had received such payment, or a large portion of it, etc.

It was admitted in the record and on the argument that at the time plaintiff acquired such notes as stated he had no actual notice of the alleged fraud nor of the resolution of the directors restricting the powers of the president as to the signing of business papers of the company.

The court, being of opinion that on the admissions of the parties and the evidence, if believed, the plaintiff was entitled to recover, so instructed the jury. Verdict for plaintiff. Judgment, and defendants excepted and appealed.

J. Elmer Long, W. S. Coulter, and Gattis & Gattis for plaintiff.
Parker & Long for defendants.

HOKE, J. Defendants except to the validity of this recovery on the ground that plaintiff being a stockholder in the Twin City Monument Company is affected with constructive notice of the limitations put upon the power of the president to endorse the notes sued upon, and is conclusively bound by them. The position, as we understand it, being that as to plaintiff the legal title has not passed from the company, and the claim is open to any defenses that could be made against the company. This, though it is admitted that the plaintiff had no actual knowledge of the resolution of the directors on the subject.

It is very generally true that a stockholder is bound by a corporate resolution regularly passed pursuant to its charter and by-laws. *Meisenheimer v. Alexander,* 162 N. C., 227-233, but the principle prevails only in reference to his status and rights as a stockholder, and in a transaction where the stockholder deals with the company as a customer in an independent business relation he is entitled to have his rights considered and determined in that aspect.

The position adverted to is very well stated in *Pearsall v. W. U. Tel. Co.*, 124 N. Y., 256, as follows: "A shareholder in a corporation is not chargeable with constructive notice of restrictions adopted by a board of directors or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers." And so stated is very generally recognized and approved as the rule that should prevail on the subject. 14 Corpus Juris, p. 845, sec. 1285; 7 R. C. L.; Corporations, sec. 282, p. 306; 2 Cook on Stockholders; Cook on Corporations (3 ed.), sec. 727, p. 1121. This being true, the legal title to these notes would, in our opinion, pass by the endorsements of the president of the company, notwithstanding the resolution of the directors establishing limitations upon his powers. Such endorsement being within the scope of his apparent powers, and coming under the accepted and wholesome rule that a principal who has clothed his agent with apparent authority to do an act may not repudiate such authority, and the effect of it by reason of private instructions or limitations uncommunicated or unknown to the other party.

On the facts presented, not only is the president shown to be in charge of the company's transactions of this character, giving him the *prima facie* right to make the endorsement, but it appears also that the money procured by reason of this endorsement, or the great bulk of it, has been turned over, and is now held by the company, and in every aspect of the matter, therefore, the endorsement should be upheld as effective to pass the legal title to the purchaser. *Morris v. Basnight,* at present term; *R. R. v. Smitherman,* 178 N. C., 595; *Trollinger v. Fleer,* 157 N. C., 81; *Watson v. Proximity Mfg. Co.,* 147 N. C., 469. In *Smitherman's case* the principle applicable is stated as follows:

"Secret limitations upon the authority of an agent to bind his principal contrary to the usual or apparent authority conferred upon agencies of like character, are not binding upon those dealing with such agent when unknown to them, and they are under no obligation to inquire into the agent's actual authority; and where they have dealt with the agent, relying upon his apparent authority in good faith, in the exercise of reasonable prudence, the principal will be bound by the agent's acts in the usual and customary mode of doing such business, though the agent may have acted in violation of his private instructions."

And in *Trollinger v. Fleer, supra,* it was held further: "When one person holds another out as his agent and thereby induces others to act to their prejudice, upon the assumption that he had full authority to represent him, it is the same in law as if he had expressly authorized him to do so; or, if he ratifies what he did, it is the same, in effect, as if he had in the beginning actually and expressly conferred the requisite authority."

And it appearing further from the record that plaintiff so holding the notes by endorsement before maturity has bought for a full and fair price without knowledge or notice of the alleged fraud or of the facts tending to establish it, we concur in his Honor's view that the evidence presents no valid objection to plaintiff's recovery on the notes as holder in due course.

We find no error in the record, and judgment for plaintiff is affirmed.

No error.

F. S. MILES v. MRS. OLA S. WALKER AND HER HUSBAND, ED. WALKER.

(Filed 28 April, 1920.)

1. Landlord and Tenant—Leases—Destruction of Premises—Payment of Rent—Statutes—Common Law.

The common law doctrine that the lease of a store or other building conveying the present right to the soil, does not relieve the lessee of his obligation to pay the stipulated rent during the term unless the contract so provides or the lessor is under contract to repair, when the building is destroyed by accidental fire, or so injured as to be unfit for its purpose, has been modified to some extent by our statute, Rev., sec. 1992, providing in such instances, and where the main inducement for the contract was the use of the house, that the lessee may surrender the estate by a writing to that effect delivered within ten days from the damage and on paying the rent accrued and apportioned as to the remainder of the injury, etc.

2. Statute—Common Law—Landlord and Tenant—Leases.

The modification of the common law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by Rev., sec. 1992, under certain conditions, is to some extent a legislative recognition that, without its provisions, the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common law principle, has application, when the lessee is insisting on certain rights arising to him under the provisions of the lease.

3. Landlord and Tenant—Leases—Rent—Voluntary Repairs—Contracts—Breach—Damages—Lessor and Lessee.

Though the landlord may be under no implied obligation to restore or repair a building which had been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for breach the landlord may be held responsible.

4. Same—Evidence.

The leased premises, consisting of a building for a store was accidentally destroyed by fire during the leased period, without fault on the

part of the lessee, the consideration being a stipulated monthly rental and the lessee's placing within the building certain shelving to become the property of the lessor at the termination of the lease, for one year or an extension of three years upon a certain further consideration. Soon after the commencement of the lease with the lessee in possession, and while preparing to put in the shelving, the fire occurred, and the landlord entered into possession, and erected a more attractive store building for which he could get a higher rent than for the destroyed store, and refused to let the lessee into possession, but rented it to another, for which the latter brings his action for damages. *Held*, sufficient to sustain a verdict in plaintiff's favor.

5. Landlord and Tenant—Leases—Rent—Repairs—Consideration—Reasonable Time—Independent Obligations.

Where a monthly rental to be paid by the lessee for a building, and an obligation to make certain repairs by him, is specified as the consideration for the lease, with forfeiture of the lease upon the non-payment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent obligations, and the law will imply that the lessee be given a reasonable time in which to make the repairs if none is stated in the lease.

6. Contracts—Evidence—Leases—Parol Evidence—Landlord and Tenant—Lessor and Lessee.

Parol evidence of assurances that the lessee would immediately put certain shelving in a store building, the subject of the lease, and afterwards a written lease was executed between the parties, silent as to the time when this should be done, this parol evidence is too indefinite to be allowed contractual effect, and in any event it is controlled by the terms of the written lease that the parties afterwards executed, and is inadmissible.

7. Evidence— Parol Evidence— Contracts, Written— Leases— Landlord and Tenant—Lessor and Lessee.

The rule excluding parol evidence of a written paper or document applies only in actions between the parties to the writing and where the enforcement of obligations created by it is substantially the cause of action, and not to collateral matters, though they be revelant to the inquiry; and, when so revelant, parol evidence of a written sub-lease may be shown in an action upon the lease between the owner of the leased premises and his lessee.

8. Husband and Wife—Contracts—Leases—Breach—Damages—Married Women—Separate Property—Statute—Specific Performance.

A married woman may be held in damages for the breach of her contract in the lease of her separate lands for more than three years, though her husband has not joined therein or given his written consent thereto. Whether the lease in question is capable of specific performance under the provisions of Rev., sec. 2096, authorizing a married woman to contract as a *feme sole* in certain instances, *Quaere?*

CIVIL ACTION to recover damages for failure on part of defendant to carry out the provisions of a written lease, tried before *McElroy, J.*, and a jury, at November Term, 1919, of ROCKINGHAM.

On the trial it was properly made to appear that plaintiff had a written lease of a store building, signed by defendant owner, a married woman, in terms as follows:

"This agreement, made and entered into this the 1st day of January, 1917, by and between Mrs. Ola S. Walker, party of the first part, and Felix S. Miles, party of the second part.

"Witnesseth, That in consideration of the improvements hereinafter mentioned, to be made by the said Felix S. Miles, to the property of the said Mrs. Ola S. Walker, hereinafter described, the said Mrs. Ola S. Walker hereby agrees to rent her store building, known as No. 10 Scales Street, in the town of Reidsville, N. C., to the said Felix S. Miles, for a period of one year from this date at a rental of twenty-five dollars per month, payable by the said Felix S. Miles to the said Mrs. Ola S. Walker, monthly; and the said Mrs. Ola S. Walker hereby agrees to give the said Felix S. Miles the option to continue this said lease for the period of four more years at the same price and terms as above mentioned.

"The said Felix S. Miles hereby agrees to put into the said building a set of oak shelving practically as good as new and costing when new approximately four hundred dollars, which said shelving will greatly enhance the value of the property, and the said Felix S. Miles hereby agrees that upon the termination of this lease, the said improvements installed by him shall thereupon become the property of the said Mrs. Ola S. Walker.

"It is further agreed by and between the parties hereto that if the said Felix S. Miles shall fail to pay the said rents promptly as above agreed upon, that then this lease shall thereupon become null, void, and of no effect.

"It being understood that this lease is to cover the entire building, the said Felix S. Miles having the right to subrent any portion of said building (within the limits of this lease) as he may desire.

"In witness whereof, we, the parties hereto, have hereunto set our hands and seals, the day and year first above written.

FELIX S. MILES. (Seal.)
MRS. OLA S. WALKER. (Seal.)"

"It was admitted on the trial that the lease bearing date 1 January, 1917, was not actually executed till 18 February, 1917."

It appeared further that plaintiff had possession of the property under the terms of the lease, and that on 22 March, 1917, without fault on plaintiff's part, the building was practically destroyed by accidental fire, or so extensively injured that it was no longer suitable or available for store purposes.

That without further agreement between the parties concerning it, the defendant owner entered on the premises and repaired the building, making the same substantially as it was before the fire, except that it was more attractive and desirable. That at the time of the fire the oak shelving referred to in the contract of lease had not been placed in the building, but plaintiff had procured the shelving and had arranged for having them installed on the day after the fire.

That the repairs were substantially completed on 1 September, 1917, when defendant refused to allow plaintiff to reënter or use the store, and, over his protest, rented same to other parties at a much higher price. That plaintiff within the time had signified his desire and purpose to hold and extend the lease for the four additional years, and for several months had tendered the monthly rental due under the terms of the contract.

There was denial of liability; the defendant insisting that the lease with all rights thereunder had become forfeited by reason of failure on part of plaintiff to install the shelving, etc. Defendant also excepted to the ruling of the court excluding certain evidence offered by defendant to the effect that in conversations and in one or two letters written by plaintiff prior to execution of the lease, plaintiff had expressed the intention, amounting to an agreement that he would install the shelving "immediately," and that such stipulation had the force and effect of a condition precedent to the lease as a binding agreement, etc. Defendant made further objection that the court had allowed plaintiff to state that he had sublet the property to Steiner & Company at a monthly rental of $50, when it appeared that such sublease was in writing.

On issues submitted, the jury rendered the following verdict:

"1. Did the plaintiff and defendants enter into the contract of lease, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff suffer termination of his rights under the contract of lease by failure to install the shelving as agreed? Answer: 'No.'

"3. Did the defendant, Ola S. Walker, after the store was repaired and ready for occupancy, wrongfully fail and refuse to permit the plaintiff to enter and occupy the same, under the contract of lease? Answer: 'Yes.'

"4. What damages, if any, is plaintiff entitled to recover? Answer: '$800.'"

Judgment on verdict for plaintiff, and defendant excepted and appealed.

P. W. Glidewell and Manly, Hendren & Womble for plaintiff.

W. R. Dalton and King & Kimball for defendants.

HOKE, J. In States like ours, basing their system of jurisprudence on the principles of the common law, it is the accepted position that where a store building or other is held under a lease, conveying also the present right to the soil, and the same is destroyed by accidental fire, or so injured as to be unfitted for its principal purpose, the lessee is not relieved of the obligation to pay the stipulated rent during the term unless the contract so provides, or the landlord is under a covenant to repair. *Gates v. Green,* 4 Paige Chan., p. 355; *McMullan v. Solomon,* 42 Ala., 356; *Viterbo v. Friedlander,* 120 U. S., 708-712; 16 R. C. L., pp. 956-57, title, Landlord and Tenant, sec. 465; McAdam on Landlord and Tenant, sec. 198; Taylor on Landlord and Tenant (9 ed.), p. 468. In the citation to McAdam, the general principle is stated in part as follows:

"It seems to have been the doctrine of the common law rent issued out of the land itself regardless of the erection thereon, and, therefore, that the destruction of the buildings on the leased premises, or those becoming unfitted for use, did not discharge the obligation of the tenant to pay the rent as agreed upon for the full terms."

The position referred to has been modified to some extent by statute in this State, Rev., 1992, and in which it is provided that where a building is destroyed or rendered unfitted for use during the term, without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs and the use of the house, was the main inducement for the hiring, the lessee may surrender the estate by writing to that effect delivered within 10 days from the damages, and on paying the rent accrued and apportioned as to the remainder to the time of the injury, etc., etc. The law in question, however, enacted for the benefit of the lessee, has no bearing on the instant cases, as the lessee is insisting on certain rights arising to him under the provisions of the lease, and the fact that the statute was enacted is to some extent a legislative recognition that without its provisions the principles of the common law would prevail. Again it is held as apposite to the facts presented—that while a landlord is under no implied obligation to restore or repair a building which had been destroyed or injured to the extent and in the manner suggested, if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for breach the landlord may be held liable in damages. *Smith v. Kerr,* 108 N. Y., 31, cited and approved in Taylor on Landlord and Tenant, sec. 329.

A proper application of these principles is in full support of the recovery had by plaintiff in the cause, and we find no reason presented for disturbing the results of this trial.

It is chiefly urged for error that the court excluded certain evidence offered by defendant as tending to show a forfeiture of the lease by reason of failure to install the shelving designated in the contract of lease. It was not contended that this would follow from the stipulations contained in the written lease. This, as his Honor ruled, clearly allowed plaintiff a reasonable time to procure and put up the shelving. Nor does it come within the provision of the lease forfeiting the same for nonpayment of rent. The liability to repair when the same exists and to pay rent being as a rule distinct and independent obligations. McAdam on Landlord and Tenant (3 ed.), p. 1259. Defendant, however, insists that by reason of a further additional agreement in parol between the parties made at or before the execution of the written lease, the obligation to put in the shelving was immediate and in the nature of a condition precedent to the maintenance of plaintiff's rights. A perusal of this proposed evidence will show, however, that it consisted of more general statements or assurances given when the parties were consulting together as to the terms of the contract they were expecting to make, to the effect that the shelving would be "put in at once," etc. They seem to be too indefinite to be allowed contractual effect, and in any event they are controlled by the terms of the written lease that the parties afterwards executed. The delay about the shelving, slight in itself, is very satisfactorily explained in the testimony, and the case, in our opinion, comes clearly within the wholesome principle that when persons have reduced their contract to writing, plain of meaning, parol evidence as to contemporary or precedent "assurances and understandings" in conflict with the written agreement is incompetent. *Mfg. Co. v. McCormick,* 175 N. C., 277, citing *Woodson v. Beck,* 151 N. C., 145; *Walker v. Cooper,* 150 N. C., 129; *Walker v. Venters,* 148 N. C., 388; *Mudge v. Varner,* 146 N. C., 147; *Bank v. Moore,* 138 N. C., 532.

Again it is objected that the court, over defendant's objection, allowed plaintiff to say that he had sublet the property at $50 per month, the objection being put on the ground that this sublease was in writing, but as held in numerous cases on the subject, the rule excluding parol evidence of the contents of a written paper or document applies only in actions between the parties to the writing, and when the enforcement of obligations created by it is substantially the cause of action, it does not prevail as to collateral matters though they may be relevant to the inquiry. This exception must also be disallowed. *Morrison v. Hartley,* 178 N. C., 618; *Holloman v. R. R.,* 172 N. C., 375; *Ledford v. Emerson,* 138 N. C., 502.

Defendant excepts further that the lessor is shown to be a married woman, and her husband not having joined in the lease or given his written assent thereto, and the lease being for more than three years, is

avoided by sec. 2096 of Revisal, and is expressly excepted from the provisions of the Martin Act, Laws 1911, ch. 109, making a married woman to contract and deal as if she were a *feme sole.* It may be that under the effect and operation of the statutes referred to, no specific performance of this lease could be enforced, but in a contract of the kind presented, our decisions on the subject are to the effect that in case of breach, a married woman may be held liable in damages, and plaintiff's recovery for such breach must therefore be upheld. *Sills v. Bethea,* 178 N. C., 315; *Everett v. Ballard,* 174 N. C., 16; *Warren v. Dail,* 170 N. C., 406.

We find no reversible error in the record, and judgment for plaintiff is affirmed.

No error.

J. T. BOSTWICK AND BROTHER v. LAURINBURG AND SOUTHERN RAILROAD COMPANY.

(Filed 28 April, 1920.)

1. Judgments—Default and Enquiry—Pleadings.

Allegations of a complaint against a railroad to recover a specified amount of damage to shipment of carload of cantaloupes for defendant's failure of its obligation to furnish cars at a specified time and place for the loading, are insufficient for judgment by default final, and such judgment may not be rendered in the course and practice of the Courts.

2. Judgments—Irregular Judgments—Motion to Set Aside—Limitation of Actions—Statutes.

Where a judgment by default has been irregularly entered, it may be set aside, on motion made within a reasonable time and on a proper showing of merits, in the sound legal discretion of the Court, and in proper instances more than twelve months after the rendition of the judgment, this period being a statutory restriction applying only to judgments entered according to the course and practice of the Courts, wherein it is necessary that motions to set aside the judgments be made. Rev., sec. 513.

3. Judgments—Default Final—Motions—Statutes—Limitation of Actions.

Allegations in the complaint in an action to recover damages to a shipment of cantaloupes that it had been sold to a particular customer at a certain price, which sale had been lost by the breach of contract of defendant railroad to furnish a car; that upon presentation of claim the defendant had instructed plaintiff to sell the melons to the best advantage and deduct the price from the total demand, which the plaintiff had done leaving a balance in a certain sum set out in the complaint for which judgment is claimed, and showing the amount of loss deducted, is sufficient to sustain a judgment by default final, in that sum, for the want of an answer in accordance with the course and practice of the Courts.

4. Judgments— Default— Pleadings—Allegations—Several Causes—Default Final.

Where a complaint states two or more causes of action arising from the same default and any one is sufficient to uphold a judgment by default final for the want of an answer, which has been entered in the due course and practice of the Courts, such judgment will be upheld.

5. Judgments—Default and Enquiry—Default Final—Implied Admissions—Definite Damages—Computation—Statutes.

Where a judgment by default may be entered in the due course and practice of the Courts, an inquiry is only necessary where the amount of the claim is uncertain, but where the claim is precise and final by the agreement of the parties or can be rendered certain by mere computation, there is no need of proof, for the judgment by default admits the claim, and a judgment by default final should be entered. Rev., 556.

6. Pleadings—Interpretation of Verification.

The verification to a complaint upon which judgment by default final for the want of an answer has been rendered, is not objectionable on the ground that it apparently shows that the plaintiff appeared before himself for the purpose, when by a proper perusal of the affidavit it will show that it followed the form approved and required by the statute and precedents, and was duly made before the clerk of the Superior Court in which the cause was pending.

MOTION to set aside judgment by default final, heard before *Finley, J.*, at March Term, 1920, of SCOTLAND.

The general course of proceedings leading up to the principal judgment are embodied in his Honor's present judgment denying the motion as follows:

"1. That summons in this action was issued on 4 July, 1917, returnable to October Term, 1917, of Scotland Superior Court, and duly served upon the defendant on 5 July, 1917; that the plaintiffs filed their complaint on 20 September, 1917, and furnished a copy to defendant's counsel, Hon. G. B. Patterson.

"2. That the case was calendared for trial at the March Term, 1918, and at the April Term, 1918, and continued to allow defendant to file answer.

"3. That no answer was filed, and at the June Term, 1918, judgment was rendered by default final for failure to file answer.

"4. That the motion to set aside this judgment was made at October Term, 1919, more than twelve months after the rendition of the same, otherwise the defendant has a good and meritorious defense.

"5. That upon the defendant's contention that the judgment is irregular, the court holds, as a matter of law, that the verification of the complaint, as appears of record, is sufficient under statute to support the judgment, and the court further holds as a matter of law that complaint states such a cause of action as will support the judgment.

"6. That the general order allowing time to file pleadings made at the June Term, 1918, was made after the rendition of the said judgment.

"Upon the foregoing facts the court declines to set aside the judgment, as a matter of law, and the defendant excepts and appeals to the Supreme Court."

Russell & Weatherspoon for plaintiff.
Cox & Dunn and G. B. Patterson for defendant.

HOKE, J. Defendant seeks to sustain his application to set aside the original judgment on two grounds:

1. That the complaint is not properly verified.

2. That it does not state a cause of action that justifies a judgment by default final.

Considering these positions in reverse order, the complaint states plaintiff's claim in the form of 3 causes of action, and demanding recovery for the same amount in each, $984.04. As a first cause of action, plaintiff avers: That, in the late summer of 1916, they were engaged in shipping cantaloupes to market in car-load lots over defendant road, and had a contract with defendant company that, on notice given by 7 p.m. of one day, defendant road would have the designated number of refrigerator cars on at the shipping station at Laurinburg, on the following morning by 7 a.m.; that the notice had been given for 4 cars to be in readiness at the proper point on 1 August, 1916, and in expectation of compliance, plaintiff had a sufficient number of cantaloupes properly crated, etc., and ready for shipment at the appointed hour and place; that defendant, in breach of its contract, failed to supply the cars till late in the afternoon, leaving the said cantaloupes exposed, etc., whereby they were greatly injured and deteriorated in value, to plaintiff's damage, $984.04.

The third cause of action, alleging the same damages in kind and amount, is substantially a repetition of the first, and both containing a claim only for unascertained damages, a judgment by default final is irregular, and, on application made within a reasonable time and on a proper showing of merits, may be set aside in the sound legal discretion of the court. *Beckton v. Dunn,* 137 N. C., 559; *Witt v. Long,* 93 N. C., 388; *Williams v. Lumber Co.,* 118 N. C., 928-936. And this, in proper instances, though the motions may be made more than 12 months from the rendition of the judgment, the decisions on the subject being to the effect that this 12 months limitation is a statutory restriction, Rev., 513, applying only to judgments which have been taken according to the course and practice of the court. *Calmes v. Lambert,* 153 N. C., 248, and authorities cited.

In the second cause of action, plaintiff states his claim in a more definite and precise way, as follows:

After alleging that plaintiff at that time was engaged in shipping cantaloupes to market, and that defendant was to supply refrigerator cars, on notice, there was a breach of contract, causing great damage and practical loss of melons, the complaint avers further that plaintiff had sold these particular melons to a responsible purchaser for $1,088.47; that the bargain was lost by reason of the injury occasioned by defendant's breach of contract; that plaintiff presented claim for the entire price to defendant company, and was told by the "duly authorized agent of defendant to sell the damaged melons to the best advantage, credit the purchase price received on the bill as rendered, and that the defendant road would pay plaintiff the difference; that plaintiff, in compliance with these instructions, sold the melons for $104.43, credited same on the bill rendered, $1,088.47, leaving a balance due plaintiff of $984.04, for which judgment is claimed.

"It is held with us that when a complaint states two or more causes of action and any one of them is sufficient to uphold a judgment by default final, such judgment will be upheld, and this being true, we are of opinion that plaintiff's suit, as presented in this second cause of action, is sufficiently definite and precise to support the judgment, that the same has been entered according to the course and practice of the court, and is in all respects regular. *Scott v. Life Association,* 137 N. C., 515-522; *Cowles v. Cowles,* 121 N. C., 272; *Adrian & Vollers v. Jackson.* 75 N. C., 536.

"In *Adrian & Voller's case* it was held that, where a claim for damages is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. An inquiry is necessary only when the claim is uncertain. These decisions are but the proper and necessary construction of our statute on the subject, Rev., 556, which provides that a judgment by default final may be had on failure to answer, when a complaint sets forth one or more causes of action consisting of a breach of an express or implied contract to pay absolutely or upon a contingency a sum or sums of money fixed by the terms of the contract or capable of being ascertained thereupon by computation."

The motion having been made more than 12 months after rendition to the judgment, defendant's right to relief on account of surprise or excusable neglect is precluded by the express terms of the statute, Rev., 513, requiring that such applications as against a regular judgment must be made within 12 months.

In this aspect of the matter, therefore, his Honor was clearly right in holding against defendant as a conclusion of law. *Lee v. McCracken,*

170 N. C., 575. The objection to the verification is without merit. This was placed on the ground that the affidavit apparently showed that plaintiff had appeared before himself. But a proper perusal of the affidavit will show that it is made by one of the plaintiffs; that it follows the form approved and required by the statute and precedents, and that it was duly made before the clerk, and here, too, we are of opinion that the judgment is according to the course and practice of the court, and has been properly upheld.

There is no error, and the judgment is

Affirmed.

W. M. SMITH, ADMINISTRATOR OF OLLIE C. KISTLER v. MASSACHUSETTS BONDING AND INSURANCE COMPANY.

(Filed 28 April, 1920.)

1. Insurance, Accident—Change of Occupation—Hazardous Risks—Electricity—Employer and Employee—Master and Servant.

The insured was employed as superintendent or supervisor of a corporation engaged in the transmission and manufacture of high power electricity, and his employment was so designated in his policy of insurance, wherein it was stipulated that it would not be forfeited by a change of occupation to one therein designated as in a more hazardous class, for which a higher premium was charged, but that the amount of loss, in case of death, etc., would be diminished in proportion to the difference in the premiums charged. The duty of a lineman was in a more hazardous class, requiring a higher premium than the occupation of superintendent, and the insured was killed from the effect of a current of electricity received by him when cutting a wire to remove a kink therefrom when instructing the lineman how to do so, this being in the course of the lineman's duty to his employer. *Held*, the act of the insured in showing the lineman how to remove the kink came within the scope of the superintendent's or supervisor's employment as such, and was not a change to a more hazardous employment; and it was reversible error for the trial Court to direct a verdict in defendant's favor, that the plaintiff could only recover the reduced amount.

2. Employer and Employee—Master and Servant—Duty to Instruct—Hazardous Employment—Questions for Jury—Matters of Law—Trials.

The right and duty of the master to instruct his servant as to how he should perform dangerous work may involve questions of fact to be decided by the jury, but the right and duty itself, to instruct, in proper cases, exists as a matter of law.

CIVIL ACTION, tried before *Shaw, J.*, and a jury, at October Term, 1919, of MECKLENBURG.

The intestate of the plaintiff was employed by the Southern Power Company, a part of whose business is the manufacture and transmission

of electricity, and the decedent's occupation was the supervision of construction work, building tower and pole lines, and maintenance of the same. The defendant insured him, among other provisions of the policy, against loss of life and the effect of injuries resulting solely from external, violent, and accidental means. The policy contained this clause: "If the assured contracts illness or sustains injury, fatal or otherwise, after having changed his occupation to one class by the company as more hazardous than that herein stated, or while doing any act or thing (except ordinary duties about his residence, or while engaged in recreation) pertaining to any occupation so classed, then this policy shall not be forfeited, but the liability of the company shall be only for such proportion of the principal sum or other indemnity as the premium paid by him would have purchased at the rates and within the limits fixed by the company for such more hazardous occupation, according to its rates and classification of risks filed prior to the occurrence of the injury, or the commencement of the illness for which indemnity is claimed, with the State official having supervision of insurance companies in the State where the assured resides at the time this policy is issued." If the insured violated this provision, the beneficiary is entitled to recover $125, and if he did not, she is entitled to recover $650. The insured stated in his application for the policy that he was "foreman and supervisor, having overseeing duties only." There was evidence tending to show that, at the time he was killed, he was on a tower of one of the power company's lines with a gang of hands or linemen instructing them how to perform their work, and while doing so, and as a part of his duty as foreman or supervisor, he cut a wire where there was a kink in it near the insulators on the loop in order to get the kink out and connect the joints. As he cut the wire he was knocked off the tower and fell forty feet, receiving injuries from which he died. There was evidence tending to prove that cutting the wire, under the circumstances, was a part of his duty in the instruction and supervising of the hands. Witnesses testified that he was there in his capacity as foreman, showing the hands how to do the work; demonstrating at the particular time when he was killed to one of the workmen how the work should be done. He had been foreman for nine years. He was knocked off the tower because the circuit was not grounded on both sides of him, and he therefore received into his body the static current, which means that the electric fluid had been taken off the line and gathered in the wire, one side being grounded and the other side open, and when the wire was cut, it let the static in on the line. The foreman, with his gang, was changing insulators when he was killed. The court directed the jury to answer the issue, "$125, with interest from 23 March, 1918, until paid." The jury returned the following verdict:

"Is the defendant indebted to the plaintiff, and if so, in what sum? Answer: 'Yes; $125, with interest from 23 March, 1918, until paid.'"

The plaintiff excepted and afterwards assigned as error the charge of the court directing the verdict, and insisted that the court should have submitted the case to the jury upon the evidence to find whether the cutting of the wire was a part of intestate's duty as foreman or was an act of the class forbidden by the policy. The defendant excepted, because the court allowed interest and cost. Plaintiff appealed.

A. B. Justice and J. D. McCall for plaintiff.
J. F. Flowers for defendant.

WALKER, J., after stating the facts as above: There was no change of occupation by the deceased. He was performing his duty in his occupation as supervisor, foreman, or overseer at the time he was killed, although he may have done one hazardous act not pertaining to that occupation, which caused his death. This has been settled by this Court, and the principle seems to have received the almost uniform approval of the other courts. *Hoffman v. Ins. Co.,* 127 N. C., 338; *Miller v. Ins. Co.,* 168 Mo. App., 330-332; *Schmidt v. Am. M. Acc. Asso.,* 96 Wisc., 304; *Fox v. M. F. Acc. Asso.,* 96 Wisc., 390; *Pac. Mu. Life Ins. Co. v. Van Fleet,* 47 Colo., 401; *Hall Am., etc., Acc. Asso.,* 86 Wis., 518. In the *Hoffman case,* Crisp, the insured, represented that he was "a freight flagman, not coupling or switching," and he was killed while placing a "slack pin" behind a coupling pin, and he was allowed to recover. We do not construe the expression "or while doing an act or thing pertaining to any occupation so classed" as more hazardous, to mean that if the injury is caused by the doing of an act within the line or scope of the insured's employment, if hazardous, he is to be paid only the diminished amount of insurance, if it also be an act which pertains to a more hazardous business, but as meaning, at most, that if he does a more hazardous act of another occupation, not pertaining to his own, the payment to him shall be reduced as specified. Cutting the wire would not be an act or thing more hazardous than his own occupation, as that was a part of his own duty as overseer, as we have shown, and therefore would not be embraced by the following language of the policy: "while doing an act or thing pertaining to any occupation so classed as more hazardous than that herein." Any other construction would make the policy a deception and a snare. The one we adopt is a reasonable interpretation of the language used, and the only admissible one. Under the other construction the company would be saying to the insured: We accept your risk as a supervisor and overseer, but if you do a certain act, which is essential to the proper and full performance of your duties to your employer, you must forfeit the larger part of your insurance.

It was said in *Redmond v. U. S. Health & Acc. Ins. Co.*, 96 Neb., 744: "The diminished liability for which the contract provides applies to a change of occupation, or the doing of an act or thing pertaining to a changed occupation, classed as more hazardous than the one abandoned, and not to mere temporary acts generally performed by those in other occupations, where there has in fact been no change in assured's occupation," citing *Thorne v. Casualty Co.*, 106 M., 274; *Miller v. Mo. State L. Ins. Co.*, 168 Mo. App., 330.

Our case is stronger for the plaintiff than the case from Maine was for Thorne, because here the act done which proved to be fatal was within the line of Ollie Kistler's duty, or there is evidence that it was, and we must assume that evidence to be true in dealing with a directed verdict. The same principle as that decided in the *Redmond case, supra,* was adopted in *Pacific Life Co. v. Van Fleet, supra,* where it was held, as shown by the tenth headnote, that, "A condition in an accident policy avoiding it, or limiting the recovery, in case the assured is 'injured or killed while following any occupation, or in any exposure, or performing acts parallel in hazard to the characteristic acts of any occupation classed by this company as more hazardous,' etc., is effective only where there is a permanent change of occupation. A recovery is not defeated by the circumstances that the assured is injured or killed in performing some individual act, or exposing himself to some particular risk, of greater hazard than that attending his customary occupation upon which the policy was issued."

It will be observed, when reading them, that the cases we have cited go beyond what is necessary for us to hold in order to justify the larger recovery in this case. Here the insured was doing an act directly within the line of his employment as supervisor of the hands. It was his master's legal duty to have them instructed by the foreman or some one else, and his right to have them familiarized with the methods of performing their work, and this is what the intestate was doing when he received the fatal stroke of the electric current, and intestate also was required by the implied terms of his employment to instruct the hands in their work. He could not well supervise them without doing this. It was held in *Schmidt v. A. M. Acc. Asso., supra,* that "The acts of the insured (a supervisor), in such a case, in not only indicating how the work should be done, but actually taking hold and assisting therein when necessary or convenient would not constitute a substantial change of occupation, since the word 'supervising,' as used in the applications, means taking part in the work."

It was said in *Thorne v. Casualty Co., supra,* that "From the nature of the business then is to be implied the duties and responsibilities of his employment. As head of the concern in Gardiner, he was solely

responsible for its management. He was superintendent of every department, and responsible for every detail of the business. The designation of his office, therefore, by necessary implication not only authorized but required him to visit every part of the establishment, to direct in every detail of the work, and, if necessary, point out and illustrate how it should be done. To hold, then, that a person designated as manager of a business concern could not step from his office, to direct the performance of any part of the work, without being charged under an insurance contract with engaging in work defined in the policy as extra hazardous, would be to put a serious check upon the transaction of business, or cut down the indemnity for which a policy holder had fully paid, and to which he would be otherwise entitled."

In *Miller v. Ins. Co., supra:* "As has been stated, it is agreed deceased was a contractor, and we can see no sound reason for the assertion that a contractor loses his character as a supervisor because he sees the need of some temporary labor on his part to enable him properly to carry on his duty of supervision. In this case the evidence shows that deceased was directing or supervising the work, and was not engaged as one of the laborers. If he had not been killed he would soon have left and gone to another place. The fact that after seeing the tank was not working properly he undertook to adjust it, so as to see if it would properly perform its function, did not destroy his capacity as supervisor within the meaning of the schedule of warranties."

And lastly, in *Schmidt v. Ins. Co., supra,* it was said: "Supervising does not mean not working. On the contrary, it means, and would be naturally understood to mean, taking part in the work. Supervising indicates work, not idleness. It would be entirely consistent with supervising if the deceased not only indicated how work was to be done, but actually took hold and assisted in the work when necessary or convenient." This statement of the law was approved in the *Miller case, supra,* at p. 333.

The right and duty of the master to instruct his servant as to how he should perform dangerous work may involve questions of fact to be decided by the jury, but the right, and the duty, to instruct in proper cases will not be denied. *Brazille v. Barytes Co.,* 157 N. C., 454.

It was said in *Horne v. R. R.,* 153 N. C., 239, at p. 240: "The claim of negligence is founded upon the theory that it is the duty of employers to instruct their employees in the use of dangerous machinery before assigning them to their duty. Such obligation is recognized generally by the law writers and courts of the country," citing *Avery v. Lumber Co.,* 146 N. C., 592; *Chesson v. Walker,* 146 N. C., 511; *Craven v. Mfg. Co.,* 151 N. C., 352; *Marcus v. Loane,* 133 N. C., 54; *Turner v. Lumber Co.,* 119 N. C., 388.

There being evidence for the consideration of the jury upon the question of defendant's liability for the larger, or undiminished, amount, it was error to direct a verdict for the smaller amount. It would even be error to instruct the jury that, if they found the facts to be as stated by the witnesses, the verdict should be for the smaller amount.

New trial.

LAURA HETTIE CONNOR v. GRAND UNITED ORDER OF ODD FELLOWS ET AL.

(Filed 28 April, 1920.)

Insurance, Life— Fraternal Orders— Payment of Dues— Principal and Agent.

A member of a fraternal order had a credit in its local lodge for sick benefits, more than sufficient to pay his dues to its district lodge for a certificate of insurance issued only by the latter lodge, and while the local lodge was not the agent for the district organization for the collection of dues, its secretary and treasurer was its duly authorized agent for that purpose. The policy of insurance in the district lodge matured upon the death of its member, and payment thereof was refused to the beneficiary upon the ground that the member was not in good standing therein for failure to pay his dues, though more than sufficient money was in the hands of the secretary and treasurer of the local lodge to have paid them when due. *Held*, by the operation of law, the moneys in the hand of the secretary and treasurer of the local lodge were applicable to the dues owing by the member to the district lodge, *eo instanti* it came into his hands, as the authorized agent of the district lodge for their collection, irrespective of his omission to forward them, and the policy was not void for the non-payment of the dues.

APPEAL by plaintiff from *Shaw, J.*, at November Term, 1919, of MECKLENBURG.

This is an action *in forma pauperis*, by an aged colored woman, widow of John Connor, deceased, who was for many years a member of a colored organization, commonly styled the Odd Fellows. The case was referred to W. M. Smith, referee, and on exceptions to his report it was reviewed by the judge, who modified the facts found, and entered judgment thereon against the plaintiff, who appealed.

E. R. Preston for plaintiff.
Edgar W. Pharr and Thaddeus A. Adams for defendant.

CLARK, C. J. There were two actions, one against the District Grand Lodge, which is sued for recovery on the insurance certificate, and the

other against the local lodge to recover sick and funeral expenses. For convenience and by agreement of counsel the two cases were referred and heard as one before the referee, but on the exceptions to his report the case was heard by the judge only as to the exceptions in the action against the District Grand Lodge, and the cause was continued as to the local lodge without prejudice in any way by the decision in this case.

In this appeal the court finds as facts that John Connor was a member of the Rising Star Lodge of Charlotte, and held the policy of insurance for $200 in the District Grand Lodge payable to his wife, the plaintiff. John Connor obtained credit from the local lodge (on account of sick benefits due him) for his dues as a member of said local lodge, and also for his premiums to be remitted on his insurance certificate for the months of April, May, June, July, August, September, October, and November, 1916, which credits were entered upon the record of the local lodge. These credits the local lodge afterwards claimed were obtained by John Connor by fraud or imposition, and voted John Connor "unfinancial," which means "not in good standing," but the court finds that the credits were not obtained by fraud.

The court further finds as facts that under the rules of the local lodge a member could not become "unfinancial" in the local lodge until he was six months in arrears in his dues, nor while sick, it being the custom of said local lodge to retain out of sick benefits the monthly dues to said lodge, and to the District Grand Lodge, and to turn the dues to the latter over to one Lem Russell, secretary, whose duty it became to forward the same to the District Grand Lodge; that Lem Russell was the permanent secretary of the local lodge, and by virtue of his office was subendowment secretary of the District Grand Lodge, and as such officer received the monthly dues due the local and District Grand Lodge, amounting to 50 cents per month, and entered them in his book provided for that purpose.

The judge further found that John Connor paid no dues and obtained no credit for dues as a member of the local lodge after November, 1916, but was taken sick within 6 months from that date, *i. e.*, in February, 1917, and remained sick until he died, 24 June, 1917; that after John Connor was taken sick in February, 1917, he was informed by Lem Russell that he was financial; that the local lodge advanced or paid for John Connor his insurance premiums to the District Grand Lodge for the months of December, 1916, and January, February, and March, 1917, but did not advance or pay for John Connor any premiums on his insurance certificate to the District Grand Lodge for April, May, or June, 1917, and that he knew that the local lodge did not advance or pay for him his insurance premiums for said months, and that he neither paid nor made any effort to pay them himself; the local lodge

was not the agent of the District Grand Lodge, and the local lodge alone could determine whether it should maintain a sick or funeral benefit feature; that the insurance premiums due by John Connor to the Grand Lodge were a level monthly rate of 25 cents per month, and a failure to pay any month's premiums during the current month *ipso facto* lapsed the insurance certificate of any member making such failure; that John Connor was in good financial standing in the local lodge, and entitled to sick benefits as a member thereof when he was taken sick, and he could not become unfinancial therein as to sick benefits or other rights during his illness, and he was in good standing in the local lodge at the time of his death; that no notice was given by the secretary, Russell, to John Connor that he was nonfinancial, but as to the insurance certificate the court held that no notice was required; that for April and May, 1917, the local lodge in its monthly reports to the Grand Lodge included John Connor as a member, but did not show that he had paid the 25 cents per month insurance premiums, and the court held that his insurance certificate in the Grand Lodge became lapsed by his failure to pay the level monthly premiums for April, May, and June, 1917.

The court held that the local lodge was not the agent of the District Grand Lodge; that the insurance certificate of John Connor had lapsed and become null and void for more than two months prior to his death on 24 June, 1917, and that the District Grand Lodge is not liable to any sum to the beneficiary on account thereof, and rendered judgment accordingly.

The District Grand Lodge issued the certificates of insurance and the local lodge, if it saw fit, could establish, as this lodge did, a provision for sick benefits. The court finds as a fact that the local lodge was not the agent of the District Grand Lodge, but it also finds that the secretary of the local lodge, Lem Russell, was also *ex officio* the agent of the Grand Lodge to transmit to it the premiums due by the members upon the certificates of insurance. Though it is found as a fact that John Connor at the time of his death had failed for more than two months to pay his premiums on his insurance certificate, said Lem Russell had in his hands $36 "sick benefit dues" belonging to John Connor. It would seem clear that whenever the premiums to the District Grand Lodge by John Connor became due that so much of the fund belonging to said Connor in the hands of Lem Russell, by the operation of law would *eo instanti* be held by him for said District Grand Lodge, and should have been taken out of said $36 in his hands, and have been transmitted by him on the premiums due to the District Grand Lodge. *Bragaw v. Supreme Lodge*, 128 N. C., 354, and citations thereto in Anno Ed.

The case turns upon this proposition of law, and we think, therefore, that John Connor having $36 to his credit in the hands of Lem Russell,

the agent of the District Grand Lodge, that the 50-cent premiums due the District Grand Lodge were in its possession, being in the hands of its agent, and if they were not actually forwarded, it was the fault of Lem Russell, the agent of the District Grand Lodge, and John Connor's interest in the insurance certificate was not lapsed and forfeited, and hence the plaintiff is entitled to recover, as beneficiary in the insurance certificate held by John Connor, the $200 from the District Grand Lodge, and the judgment below is

Reversed.

WILLIAMSON REAL ESTATE COMPANY v. ALEXANDER SASSER.

(Filed 5 May, 1920.)

1. Statutes— Partnerships— Contracts— Actions— Police Regulations— Retroactive Effect—Amendments.

No vested interest can be acquired under a statute relating to the police regulations of the State and Ch. 2, Laws of 1919, repealing the provisions of Ch. 77, Laws of 1913 to the extent that the former statute denies a recovery by a partnership in a civil action that has not complied with its provisions, applies to pending actions and transactions prior to its enactment, there being no saving clause therein and nothing to show its effect should not be retroactive.

2. Statutes — Legislative Powers — Amendments — Contracts — Vested Rights.

A legislature has power, when it interferes with no vested right, to validate contracts or to ratify and confirm any act it might lawfully have authorized in the first instance.

3. Statutes—Amendments—Interpretation.

The amendment should be construed with the act it amends, considering the evils arising under the old law and the remedy provided by the amendatory act which shall best repress the evils and advance the remedy.

4. Principal and Agent—Revocation—Damages—Expenses—Value of Services Rendered—Quantum Meruit.

The interest of the agent in a contract authorized by his principal which will prevent the revocation of the authority of the latter, must be in the subject matter of the power, and not merely relate to the agent's compensation for its execution; and where the principal contracts for the sale of his land by an agent, the latter to receive whatever he could get for the land over a certain price, and there is no covenant not to revoke, the former may at any time revoke the power before the completion of the deal, leaving the remedy of the latter, an action for damages for the expenses incurred by him, and reasonable compensation for the worth of his services rendered before the revocation, and in the contemplation of the parties at the time of making the contract.

CIVIL ACTION, tried before *Connor, J.*, at November Term, 1919, of WAYNE, upon these issues:

"1. Did plaintiff sell the land described in the complaint for $26,000, as alleged? Answer: 'Yes.'

"2. What sum, if any, are the plaintiffs entitled to recover of the defendant? Answer: '6,000, with interest from 30 June, 1917.' "

From the judgment rendered defendant appealed.

Allen, Langston & Taylor for plaintiff.

Stevens & Beasley and W. S. O'B. Robinson for defendant.

BROWN, J. This action is brought to recover damages for a breach of the following contract executed by plaintiffs and defendants:

June 12, 1917.

I have employed Williamson Real Estate Company to sell for me my land situated in the county of Wayne, State of North Carolina, to wit: Portions of the Jim Williams, C. B. Elmore, and Chas. Dennings lands, containing 133 acres, more or less, located 2 miles west of Mt. Olive, at the price of $20,000 for entire tract on the following terms: One-half cash, balance in three annual payments of six per cent interest, and for the sale of which they are to have a commission of all above $20,000, if the same is sold on or before 15 November, 1917, from this date. Said Williamson Real Estate Company to pay all costs of advertising they may choose to do. Land to be sold in one or more tracts.

This 12 June, 1917.

This agreement allows said Williamson Real Estate Company said commission whether sold by them or any one else.

A. SASSER,
WILLIAMSON R. E. CO.,
By Fred R. Mintz.

It is contended that the plaintiffs cannot recover because their organization is a copartnership, and that they did not comply with the act of 1913, ch. 77. We are of opinion that the case is on all fours with *Courtney v. Parker,* 173 N. C., 479, and that plaintiffs could not recover but for the amendment to the statute, ch. 2, Public Laws 1919, as follows:

"Provided, however, that the failure of any person or persons owning, carrying on, conducting, or transacting business as aforesaid to comply with the provisions of this act, shall not prevent a recovery by said person or persons on any civil action brought in any of the courts of the State of North Carolina."

This amendment plainly applies to pending actions and to transactions prior to its enactment. There is no saving clause in it and in the absence of that it has a retroactive effect. 36 Cyc., 1164.

The act of 1913 is a mere police regulation, as is said in *Courtney v. Parker, supra,* and in *Jennette v. Coppersmith,* 176 N. C., 84. Being a police regulation and liable to be abolished at any time it necessarily follows that defendant acquired no vested right under it. It is merely a penal statute, and no one could acquire such vested right. 6 Ruling Case Law, sec. 296, and cases cited. Also, sec. 306. Persons dealing with those who had not complied with the act take the chances of the Legislature repealing or modifying it at any time.

A legislature has power, when it interferes with no vested right, to validate contracts or to ratify and confirm any act it might lawfully have authorized in the first instance. *Board of Education v. Blodgett,* 31 L. R. A., p. 70; Cooley, Const. Lim., 374; 36 Cyc., p. 1222; 36 Cyc., pp. 1164-1165; *Dyer v. Ellington,* 126 N. C., 941.

Amendments are to be construed together with the original act, to which they relate, as constituting one law. The old law should be considered, the evils arising under it, and the remedy provided by the amendments adopted, which shall best repress the evils and advance the remedy. 36 Cyc., 1164, and cases cited.

So we see there is nothing in the statute as amended that bars a recovery of damages.

The defendant contends that the court erred in instructing the jury if they believed the evidence to answer the second issue $6,000.

In this we think there was error.

There is evidence that on 13 June the defendant told plaintiff that his wife would not agree to sign the deed and to stop the matter where it is now. We understand this evidence to be denied by plaintiff, who contends that the contract was reaffirmed by defendant's letter of 6 July.

This question should have been submitted to the jury under a proper issue, and with appropriate instructions.

The learned judge evidently held that the contract was irrevocable in its nature.

The instrument is a naked power to sell the property with a commission for selling payable out of the proceeds of sale over and above a certain amount. The commission is dependent entirely upon its execution, which is dependent upon the good will of the principal. Besides, there is no stipulation in it covenanting not to revoke. *Oregon Savings Bank v. Am. Mtge. Co.,* 35 Fed., 22.

Speaking of the revocation of a similar power, the Supreme Court of Illinois says, in *Bonney v. Smith,* 17 Ill., 531: "Another class is where the attorney has an interest *only* arising out of the execution of the power, as in the proceeds, as a compensation for the business of its execution. This power is of the latter class and revocable by the principal, although the principal might perhaps be liable to the agent or

attorney for any damages sustained." *Montague v. Carroll,* 15 Utah, 318; *Walker v. Hancock Ins. Co.,* 80 N. J. Law., 342.

The consideration which is necessary to make a power, such as we are considering, irrevocable, must be independent of the compensation to be rendered for the services to be performed. *Blackston v. Buttermore,* 53 Pa., 266; *McMahon v. Burns,* 216 Pa., 448. In *Joyner v. Drake* (Miss.), 41 So. Rep., 372, it is held that a contract giving one the exclusive agency for a year to sell a tract of land on commission may be revoked at any time prior to the sale, being without mutuality.

In 21 Ruling Case Law, p. 810, sec. 46, it is said: "There seems to be no doubt that a power coupled with an interest cannot be revoked, but the interest required is an interest in the subject of the power, and not an interest in that which is to be produced by the exercise of the power."

Even where the principal wrongfully revokes an agency, the courts will not compel the principal to specifically perform it, but will leave the agent to his action for damages. Corpus Juris, 534.

We find the great weight of authority to hold that a power such as the one under consideration is not irrevocable.

If the contract was revoked the plaintiff is entitled to recover the damages sustained, but not the six thousand dollars stipulated in the contract. There was no sale of the property, although there is evidence of an agreement to sell for $26,000. The plaintiff was to receive as a commission all of the proceeds of sale over $20,000. But there were no proceeds of sale, and, consequently, there could be no commission. The plaintiff would be entitled to recover as damages all expenses incurred and labor performed and such reasonable compensation as his services performed prior to revocation were worth, and within the contemplation of the parties when the contract was entered into.

"If the jury should find that the defendant did not revoke the contract, and that plaintiff succeeded in making a *bona fide* sale of the property, and that defendant refused or failed to carry out the contract on his part, then the plaintiff would be entitled to have estimated in the assessment of damages loss of profits actually sustained by reason of defendant's failure to perform the contract on his part when called on to do so."

We need not consider the exceptions relating to the rejection of parol evidence of an agreement that the contract was not to be in force unless defendant's wife consented. This may not arise on another or the necessary amendment to the answer setting it up may be allowed.

New trial.

J. F. BRADSHAW v. HILTON LUMBER COMPANY.

(Filed 5 May, 1920.)

1. **Eminent Domain—Railroads—Rights of Way—Charters—Public Use—Constitutional Law—Statutes.**

The taking of private lands may only be authorized by statute under the provisions of our Constitution, when for a public use or interest, though full compensation may be provided for the owner.

2. **Same—Purchasers—Private Gain—Ultra Vires.**

Where the constitutional power is given by valid statute to a logging or railroad company to exercise the right of eminent domain, and the corporation has condemned a part of its right of way with the intent to complete it and put it to a public use, it may not transfer this right to a purchasing corporation to which no statutory power was given, and enable the latter to hold and exercise it exclusively for its own private gain or benefit.

3. **Eminent Domain—Actions—Parties—Railroads.**

The principle that only the State may bring an action to annul the charter of a corporation, has no application to an action for damages by the owner against a railroad company for illegally operating its railroad over his lands, exclusively for private gain and not for the public use or benefit, and to enjoin its continuance.

4. **Eminent Domain—Railroads—Purchasers—Ultra Vires—Intent.**

Where a railroad corporation is being illegally operated over the lands of the owner by a lumber company for its exclusive private gain, and not for a public use or benefit, the question of intent with which it does so is immaterial and irrelevant.

5. **Eminent Domain—Railroads—Injunctions—Ultra Vires—Illegal Use.**

The recovery of damages for a trespass is not the exclusive remedy of the owner of lands, in his action against a railroad corporation for illegally and continually operating over his lands for a private use, unauthorized by its charter and our Constitution, as an injunction may issue to prevent the continuous adverse user from creating the right to an easement and to avoid a multiplicity of suits.

CIVIL ACTION, tried before *Kerr, J.*, and a jury, at January Term, 1920, of DUPLIN.

The action is based upon the allegations that during the years 1913 to the year 1916, both inclusive, and continuously during said time, the defendant, Hilton Lumber Company, for its own private use, benefit, and advancement, unlawfully and wrongfully, and from day to day, entered upon and trespassed upon plaintiff's tract of land described in the complaint, and from day to day and continuously during said years often greatly damaged and injured the plaintiff's said tract of land.

The Hilton Railroad and Logging Company was chartered by ch. 42, Private Laws of 1901, and in the year 1906 the Hilton Railroad and

Logging Company filed its petition against J. F. Bradshaw, to condemn a strip of land 100 feet wide and 1,280 feet long. The Hilton Railroad and Logging Company alleged that it was necessary that it should acquire a right of way for the whole distance across plaintiff's lands, because the same was necessary in order to conduct and carry on the business of a public carrier, and that the Hilton Railroad and Logging Company intended and proposed in good faith to construct and operate forthwith, or as soon as practicable, a railroad for transporting freight and passengers from a point on the Atlantic Coast Line Railroad between Wallace and Teachey, near the 37th mile post, in a general direction toward and to a point at or near the village of Hallsville, Duplin County, and at present to build and construct six miles of said road to a point on the run of Island Creek, about one mile, more or less, east of the Wilmington and Kenansville public road, for the purpose aforesaid.

R. A. Parsley, secretary and treasurer of the Hilton Lumber Company, among other witnesses, testified: "We got out the charter for the Hilton Railroad and Logging Company in 1901. At that time the Hilton Lumber Company was already in existence, but it had not come to Duplin County, but it came in 1905 or 1906. There are three or four rights of way in that distance of nine or ten miles, which were condemned by the Hilton Railroad and Logging Company. All of the other rights of way were taken in the name of W. L. Parsley. The number of rights of way which were condemned for the distance of nine or ten miles by the Hilton Railroad and Logging Company is four. The strips condemned on each of the four are not connected. The Bradshaw, Harrell, and Batts are disconnected. After the condemnation of these four places the Hilton Railroad and Logging Company was asked to operate trains over the road and refused. A petition was filed in Raleigh before the Corporation Commission to require us to operate trains for public service. We declined to do so. We are not operating at all for the Hilton Railroad and Logging Company; the road is owned by the Hilton Lumber Company; the right of way is the Hilton Railroad and Logging Company's. For the purpose of getting a road on it and serving it the Hilton Lumber Company operates its trains over these rights of way, and there is no charge for hauling over it. The Hilton Lumber Company is operating trains over this line right now; it has continued to do so since it began in 1905, and it hauls logs for Hilton Lumber Company exclusively, and for no other person or corporation. The distances between the condemned tracts are as follows: Between Boney and Harrell is 817 feet; after leaving the Harrell land we cross the Boney land, Cicero Teachey, DeWitt Marshall, A. B. Farrell, and then come to the Batts' tract, and that distance is 7,157 feet, that is, from the Harrell northern line to the Batts southern line. The distance between the Boney tract and the plaintiff's tract is 817 feet."

The condemnation proceeding was held in 1908, and the Hilton Railroad and Logging Company has performed no other act in Duplin County, or elsewhere since that time, but the Hilton Lumber Company has used that right of way continuously for its private use since said date up to the present time, and now continues to use the same.

The contract, if any, between the Hilton Railroad and Logging Company and the Hilton Lumber Company was verbal.

The Hilton Railroad and Logging Company has never listed any property in Duplin County for taxation, or with the North Carolina Corporation Commission.

The following verdict was returned by the jury:

"1. Is the plaintiff, J. F. Bradshaw, the owner and in the possession of the lands described in the complaint? Answer: 'Yes.'

"2. Did the defendant, Hilton Lumber Company, unlawfully and wrongfully enter and trespass upon the plaintiff's said tract of land, as alleged in the complaint? Answer: 'Yes.'

"3. Does the defendant, Hilton Lumber Company, continue to unlawfully and wrongfully enter and trespass upon said plaintiff's tract of land, as alleged in the complaint? Answer: 'Yes.'

"4. Is the plaintiff's cause of action barred by the statute of limitation? Answer: 'No.'

"(2) Was the said trespass complained of a continuing one under the statute, section 395? Answer: 'No.'

"5. What damages, if any, is the plaintiff entitled to recover? Answer: '$150.'

Judgment was entered upon the verdict, which, among other things, granted a perpetual injunction against the unlawful acts of the defendant described in the pleadings and record. Defendant appealed.

Stevens & Beasley for plaintiff.
E. K. Bryan and H. D. Williams for defendant.

WALKER, J., after stating the facts as above: There was strong evidence tending to show that the logging road was chartered and the lumber road built for the sole use and benefit of the defendant, in order that it might haul its lumber over it for its own private purpose. So far as the logging road is concerned, it abdicated its public duty and assigned, under its contract with the defendant, all of its franchises, rights, and privileges under its charter, to the latter. This it had no power or right to do. The Hilton Lumber Company had no right of eminent domain, or right of condemning plaintiff's land or any other private property for its own use. Such property may be taken under the sovereign power for public uses, but not for those which are private. 1 Lewis

on Eminent Domain (3 ed.), sec. 250; *S. v. Lyle,* 100 N. C., 497; *S. v. Glen,* 52 N. C., 321; *Kenedy v. Erwin,* 44 N. C., 387. It must be conceded on all hands, and the numerous authorities upon the subject clearly demonstrate that the Legislature has no power, in any case, to take the property of an individual and pass it over to another without reference to some use inuring to the public benefit. Cooley Const. Lim. (6 ed.), p. 651. And the property of one individual cannot be taken for appropriation to the use of another, even for full compensation. If such a thing were done, it would be nothing but the exercise of arbitrary and despotic power and not according to the law of the land, as these words are employed in our Constitution, Art. I, sec. 17.

It appears in this case that the logging road company was chartered by the State with the right of eminent domain, and that it had condemned a right of way, but it never used it in the way contemplated by its charter, but turned all of its rights and privileges under it over to the defendant, who has used it for its own private purpose alone, and not at all for the public benefit. This is forbidden by law. The charter of the logging road has been perverted from the public use it was intended to subserve to a private use not contemplated by the Legislature, and not within its power to authorize. The case is so fully covered by the decision of the Court in Stewart's Appeal, 56 Pa. St., p. 413, that it will be quite sufficient for our purpose that we reproduce here what was said in that case about facts not merely similar, but substantially identical. The Court there stated, and relied on, the following principles:

1. A company authorized to build a railroad, and failing to obtain means, contracted with an individual to build a railroad solely for his own use on part of their route: *Held,* the company had no power to make such contract, and the individual could not build such road.

2. A bill in equity was brought against the individual who had constructed his road under the contract, to restrain him from working it, and to remove it, the company not being made party: *Held,* that the bill would lie against the defendant alone, for creating a nuisance to the plaintiff's property.

3. A single trespass, or several, not coupled with circumstances indicating that they were to be repeated continuously, is generally redressed by a common-law action. But where trespasses are constantly recurring, and threatened to be continued, they may be redressed by injunction.

4. Corporations cannot do anything outside of the powers expressly given in their charters, which are to be strictly construed.

5. The plaintiffs had brought an action for trespass against the defendant and another for breaking their close, constructing the road, etc.: *Held,* not to be in abatement of the bill, being a suit for recovery of damages for past trespasses, which is a different cause of action from a bill to prevent future trespasses.

In discussing the law, as applied to the special facts of that case, which are practically those of our case, the court, by *Chief Justice Thompson,* said: "If the New Castle and Franklin Railroad Company had power to let the portion of their road in question, to be constructed and used by a private party for private use exclusively, for an indefinite period, there is nothing to limit the principle to one such contract; there might just as well be fifty, and the whole line be farmed out to private purposes, in manifest disregard of the duty owing by the corporation to the State. The discretion which the company was to exercise in performing their undertaking under the charter would thus pass to parties to whose discretion the State committed no charge. Authority to make such a contract is not within the provision of the act of incorporation; and as it is without authority and against the policy of the law, it must be void. The authority to construct a road for the use of the public cannot be turned into an authority to construct a private road. Sometimes contractors agree for the profits of running a road as far as made, and just as made, for their own benefit, but always for the purpose of its charter, and never to exclude the public. That is not this case. The public are entirely excluded, not only by the kind of road and rolling stock on it, but by the agreement itself, and not only so, the right of eminent domain was exercised here, in substance and essence, for purposes that were private, and the plaintiff's property taken for such purpose. This was all wrong and requires to be redressed." It is further held in substance that the facts are all of one complexion and exhibit in detail and in entirety, a case in which it seems impossible to arrive at any other conclusion than that the proceedings and the construction of this little piece of road, in the manner described, was not intended as a part construction of the important undertaking with which the corporation were intrusted by the State, but merely colorable, with a view to put the defendant in possession of a right of way on which to build his own private railway, solely for the use of his mills and machinery, and in which the public could have no advantage whatever. There is no plan on which such a result can be achieved, without the violation of the principles of the Constitution and the rights of the citizen. With reference to the plaintiff's remedy to enforce a proper observance of his constitutional rights, the Court, in the *Stewart case,* said: "Perhaps, however, inasmuch as the corporation is not a party to the bill, the view we might take of the contract in this case, if it were, is not proper to be taken now. But this will not and ought not to prevent us from protecting the plaintiff's right to equitable interferences on other grounds. The corporation could not transfer its franchise, granted to benefit the public, to enable a private party to construct and maintain a private road for his own private use and benefit. *Jessup v. Loucks, supra.* If

the law be so, the defendant, in running the road in question, interrupting the plaintiff's right of free passage on the land, and creating a nuisance to the plaintiff's dwelling, has no protection under the agreement with the company, and his acts are contrary to law and prejudicial to the plaintiff's interests, and ought to be restrained. A single trespass, or several, not coupled with circumstances indicating that they were to be repeated continuously, are generally redressed by the common-law action of damages. But when they are constantly recurring, and threaten to continue, it is well settled that they may be redressed in equity by injunction, citing Story's Eq., secs. 925, 926, 927, and *Commonwealth v. P. & C. R. R. Co.,* 12 Harris, 159, and adding that there are numerous other authorities to support the proposition that it is an elementary principle now, and does not need support from other decisions, that neither a railroad corporation nor any other can lawfully do anything outside of the powers expressly given in their charters; *Com. v. Erie & N. E. R. R. Co.,* 3 Casey, 339, where the doctrines are stated, and the authorities in support of them fully set forth. The *Stewart case* seems to be perfectly parallel with this one, in all respects, both as to substantive law and the procedure by which it is enforced. The conclusion of the Court was stated in language which is directly pertinent to our facts, except as it appears that the judge of the lower court, who heard that case, dismissed the same, while the judge here granted the injunction.

"In the Supreme Court, on appeal, the Stewart suit was reinstated to the docket, the Court observing that the defendant, therefore, being without right or title in the occupancy of the land in question for the use of his railway, and the plaintiff's title in it admitted, it is manifest that the running of cars in and along it with steam locomotives, several times a day, creating dirt, dust, and smoke, is prejudicial to the plaintiff's property, and should be prevented. We must, therefore, reverse the decree of the court below, in dismissing the complainant's bill, and reinstate the same, with an order for a decree in accordance with these views and principles."

It is said in 10 Cyc., p. 1094: "Plainly a franchise possessed by a corporation cannot be transferred to an individual, unless it is such a franchise as an individual might hold and exercise. A franchise which is in its nature personal to the grantee already possessed of it, such as an exemption from taxation, cannot be sold to an individual; nor can a franchise to operate a railroad, since this would have the effect of turning a franchise granted for a public benefit into a mere means of private emolument; nor can a navigation company grant to an individual the privilege of taking water from its dams for private purposes. But, of course, the Legislature may authorize the sale of the franchise of a corporation to a natural person, and such a statute will not be unconstitutional."

There has been a great deal of discussion in the other States as to whether a railroad company can alienate its secondary franchise of constructing and of operating its railway to another, whether by sale, lease, or mortgage, without the express consent of the Legislature, but we need not further refer to this matter, as it is well settled that it may not do so, when the alienation is to a private person, and the intent and purpose is that it may be applied to his own personal use and emolument and not to the public benefit, except as the public may receive an advantage, indirectly and remotely, in a commercial way. The case of *Jessup v. Loucks,* 55 Pa. St., 350, lends strong support to our views. The defendant in this action is not the logging road, a public service corporation, but the lumber road, a private corporation, and the principle that a franchise illegally assigned by one corporation to another, or otherwise abused, or exceeded, can be annulled only in an action by the State against the offending corporation, or its alienee, does not apply, and, therefore, requires no consideration. The whole subject as to the power of alienation of its franchise by a public, or *quasi*-public corporation, owing duties to the public and enjoying the right of eminent domain, is considered in 10 Cyc., pp. 1093-1096.

What we have said would seem to be a sufficient discussion of the principles of law applicable to the facts of this case, which, so far as we have been able to ascertain, is, as it was presented, one without any analogous precedent in this State, though the general doctrine underlying the decision has often been adopted as the correct one, and is unquestionable. *R. R. v. Davis,* 19 N. C., 451, where it is said by *Chief Justice Ruffin:* "The right of public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. Writers upon the law of nature and nations treat it as a right inherent in society. There may, indeed, be abuses of the power, either in taking property without a just equivalent, or in taking it for a purpose *really not needful or beneficial to the community;* but when the use is *in truth* a public one, when it is of a nature calculated to promote the *general* welfare, or is necessary to the *common* convenience, and the *public* is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied that the power to have things before appropriated to individuals again dedicated to the service of the State, is a power useful and necessary to every body politic."

We should, perhaps, remark before closing that the payment of a consideration by the defendant to the logging road company does not alter the case, and is no excuse, or palliation for a violation of the law. *Gauley & S. R. Co. v. Vencill,* 73 W. Va., 650, and it can make no difference whether the law was violated without actual intent to do so or

ignorantly or whether it was done purposely or evasively. The fact remains that it was done to advance and promote the defendant's private interest, and this is sufficient as the basis of liability for damages and other relief. The exact form of defendant's intention is not material, for whatever the form in which the motive was conceived, the defendant has accomplished its purpose of unlawfully appropriating plaintiff's property to its private use. *Atlanta, etc., R. Co. v. Bradley,* 141 Ga., 740. He cannot do this by condemnation, even if he pays for it.

It is so well settled by the fundamental law that private property cannot be taken for private use that it is always assumed as a postulate, and no argument is needed to sustain it. A strict adherence to this rule is the only mode by which a corporation is to be held from diverting functions and rights acquired in the name of public necessity to private use, and doing indirectly what cannot be done directly. *Jessup v. Loucks, supra.* The wrongful use of the franchise or right thus acquired will subject the party guilty of it to an action for the resulting damage to the owner of the land condemned for public use. It was said in *Hales v. R. R.,* 172 N. C., 104, that an unwarranted use of a right of way in excess of the right granted will amount to a trespass, for which damages may be recovered, and, when the same is repeated and continuous, and especially when in the assertion of ownership, an injunction is a proper additional remedy, and this was said in regard to the wrongful use of a spur track by a railroad company, which had condemned the right of way on which the track was being laid. The action for damages was not the exclusive remedy. Injunctive relief is granted, as said in the *Hales case,* to prevent the continuous adverse user from creating the right to an easement, and to avoid a multiplicity of suits.

The court decided the question correctly, and we affirm the judgment.

No error.

G. R. GILLIAM v. ATLANTIC COAST LINE RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR.

(Filed 5 May, 1920.)

1. War—Statutes—Carriers of Goods—Lessor and Lessee—Government Control.

The acts of Congress as to government supervision and control of railroads did not require or intend that the Government should take possession if the management could be procured by lease or agreement with just and reasonable compensation to the companies for the possession of its properties, the object of the legislation being to leave these corporations in the control of their own officials as far as possible, and to exercise only

such general management as was necessary for the purposes of carrying on the war.

2. Same—Torts—Negligence—Return to Private Ownership.

A lease to a railroad company by the Government of its railroad's properties under the statutory supervision and control for the purposes of carrying on the war, does not relieve the carrier of liability for the actionable negligence of its servants or employees, and the fact that the property of such corporation has, since the commission of the tort, been turned back to private ownership cannot affect the carrier's liability therefor, as lessee at the time of its commission.

3. Negligence — Evidence — Railroads— Carriers— Torts— Government Control—Statutes.

In an action by an employee against a railroad for the defendant's negligence as the plaintiff was getting off its train, the evidence tended only to show that the plaintiff was employed to work with others as a carpenter at a Government camp, while the property of the carrier was under a lease from the Government, under the statute for war purposes, and that he rode daily on a shuttle train composed of cattle cars, to and from his work; that he was aware of the character of these cattle cars, and his foot slipped on a piece of steel at the door of one of them, usual in its construction, as he was getting off when the train was at a standstill for the usual place and purpose, and fell to his injury: *Held*, no evidence of the defendant's actionable negligence, but only of an unanticipated accident, and defendant's motion as of nonsuit thereon should have been granted.

APPEAL by defendants from *Calvert, J.*, at September Term, 1919, of CUMBERLAND.

This is an action against the Atlantic Coast Line Railroad Company and Walker D. Hines, Director General, for the recovery of damages for personal injuries sustained by the plaintiff 6 November, 1918, on his return to Fayetteville from Camp Bragg, where he was a carpenter employed by Government contractors. He testified that he was residing in Fayetteville, and each day went out to the camp site on a "shuttle train" composed of cattle and box cars, which left early in the morning, and returned to the city late in the evening; that from 6 October to 6 November he had been riding back and forth to and from the camp in a cattle car, and knew the kind of cars that were being run on this train; that on the evening of 6 November, 1918, he came back to the city after dark, at or about seven o'clock, and as the men were crowding out of the door of the cattle car plaintiff went to get out and his foot slipped. He says: "I went to get out and in stepping over the steel door clip, as I went to step over my foot slipped. This steel is in all cattle cars, and I got my right foot caught, and it threw me out on my left side in the coal cinders and clinkers." The engine of the train stopped at the Norfolk Southern station, or below it, and the cars were back across Hay Street and

towards Maiden Lane. He said: "This was the place the train had been stopping; had stopped there when the plaintiff rode before, the place the engine stopped was the usual place."

The defendants introduced no testimony. The defendants moved for a judgment of nonsuit, which was denied. Verdict and judgment for plaintiff; appeal by defendant railroad company.

W. C. Downing and Sinclair & Dye for plaintiff.
Rose & Rose for defendants.

CLARK, C. J. The counsel for the Atlantic Coast Line Railroad contend that the company is not liable in an action for damages because its line was under operation and control of the Government, under the general supervision of its codefendant, Walker D. Hines, Director General. But they admitted that the company was being so operated under a lease made by it to the United States Government, which lease was authorized by an act of Congress, 29 August, 1916, ch. 418; U. S. Compiled Statutes, 1918, sec. 1974a. Under the act of Congress the president was "*empowered* to take possession and assume control of any system of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment or for such other purposes connected with the emergency, as may be needful or desirable." It was not required or expected that the Government should take possession if the management of the railroads could be procured by agreement, and, accordingly, with very few exceptions, the control and management of the various railroads in this country were acquired by an actual lease from each company. The proclamation issued by the President 26 December, 1917, and 11 April, 1917, both recite that the Director General "shall enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties, and fix such just compensation as provided by law," and further, "nothing herein contained, express or implied, shall be deemed in any way to impair the right of the stockholders, bondholders, creditors, and other persons having interest in said system of transportation, or in the profits thereof, to receive just and adequate compensation for the use and control and operation of their property hereby assumed."

It is not necessary to quote in full the statute and proclamations on the subject. The object of the legislation and of the Government was to leave these corporations in the control of their own officials as far as possible, and to exercise only such general management as was necessary for the purposes of carrying on the war.

Accordingly, as has been said, leases were made by an agreement between the Director General, acting for the Government, and the railroad companies with very few exceptions. "By virtue of the lease with the Atlantic Coast Line Railroad the relation of lessor and lessee existed, and under the authority of *Logan v. R. R.*, 116 N. C., 940; *Harden v. R. R.*, 129 N. C., 354; 55 L. R. A., 784; 85 Am. St., 744, the company was liable for damages sustained in the transportation of freight or passengers, and service upon the local agent was service upon the Director General, and also upon the companies represented by him. *Grady v. R. R.*, 116 N. C., 952." This was held in *Clements v. R. R.*, in a unanimous opinion, *ante*, p. 225, in which the Court also said: "The plaintiff could not be deprived of his right of action against the company whose engine he was operating because the road was temporarily, but by lawful authority, in the control and management of a lessee, or a receiver. The plaintiff had nothing to do with that matter. The receipts and expenses of the operations will be adjusted between the company and lessee or receiver, when the accounts are settled, and the road will soon be returned to the company in all probability."

The whole matter is fully discussed and determined in that case, and also in *Hill v. Director General*, 178 N. C., 609, in which *Hoke, J.*, said: "The defendant, the Director General, must be considered a party *only* as being in the management and control of the defendant railroad," and that the company was "responsible for the torts committed while under Government control," citing numerous cases, at p. 610, where the Court said: "The act of Congress applicable, and under which the Director General professes to have taken over the control and management of the road, being an act of the 65th Congress, entitled 'An act to provide for the operation of transportation systems while under Federal control,' approved 21 March, 1918, 40 U. S. Statutes at Large, part 1, p. 457, contains, among others, the following provision, being the former portion of section 10: 'Carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act, or any other act applicable to such Federal control, or with any order of the President. Actions at law, or suits in equity, may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'"

The liability of the railroads in this State for damages such as this have been recognized without exception in every case since the passage

of the act of Congress, in the Superior Court and this Court, and there would have been unutterable confusion if shippers and passengers and others could not have looked to the lessee company for damages. The point has been contested only in the above cases, *Clements v. R. R.*, and in *Hill v. Director General,* and the unanimous opinion of the Court was rendered in both cases, after full consideration, sustaining the liability of the carrier. And, as was said in *Clements v. R. R., supra,* recovery against the carrier in such cases will not be affected by the return of these corporations to their owners, or rather the abandonment of supervision by the Government, which has since taken place on 1 March, 1920.

As for the other ground of demurrer to the evidence, however we are of opinion that there was no evidence of negligence on the part of the carrier, and that the nonsuit should have been granted. The train composed of cattle and box cars was, so far as the evidence shows, the only transportation out to the camp site and back. The plaintiff knew that this was the only accommodation that was furnished, and he chose to avail himself of it. He testified that as he went to get out, "in stepping over the steel door clip my foot slipped." He also says that "this was the place the train had been stopping and where the engine stopped was the usual place." The injury was due to an accident—the slipping of the plaintiff's foot—for which the defendants were in nowise to blame.

On review of the entire testimony for the plaintiff, for none was introduced by the defendant, we think, but as to this ground only, the motion of nonsuit should have been granted.

Reversed.

J. H. DRENNAN v. J. C. WILKES.

(Filed 5 May, 1920.)

1. Issues—Contracts—Breach—Lands—Specific Performance.

An issue as to whether the plaintiff had complied with the terms of his contract between him and the defendant is sufficient for either party to show the terms of the contract, as well as a breach thereof by the plaintiff, in an action to enforce specific performance to convey lands.

2. Issues—Forms.

The form of the issues is of no consequence if under them the material issuable facts may be fairly presented to the jury, and the trial is otherwise without error.

3. Same—Evidence.

The settling of issues upon the trial is within the discretion of the judge, and not reviewable on appeal if the parties have had opportunity to offer evidence upon every material phase of their contentions.

4. Same—Admissions—Contracts—Specific Performance.

In an action to enforce specific performance of a contract to convey lands, an issue as to the making of the contract sued upon is not required when admitted in the answer, and the other issues are sufficient to sustain the judgment appealed from.

5. Appeal and Error—Issues—Objections and Exceptions.

When the appellant is dissatisfied with the issues submitted on the trial, he should except thereto, tender the ones he thinks are proper, and assign error relating thereto; and where the pleadings involve an issue which has not been tendered by the appellant, he may not, for the first time, take exception in the Supreme Court, that it was not submitted to the jury.

CIVIL ACTION, tried before *Lyons, J.*, at December Term, 1918, of ROBESON, upon these issues:

"1. Did the plaintiff comply with the terms of the contract between him and the defendant? Answer: 'Yes.'

"2. Did the defendant refuse to perform his contract with the plaintiff? Answer: 'Yes.'"

From the judgment rendered defendant appealed.

S. B. McLean for plaintiff.

Woodberry Lennon and McLean, Varser, McLean & Stacy for defendant.

BROWN, J. This is an action to compel the specific performance of a contract to convey a tract of land.

It is contended in this Court that the issues are insufficient to support the judgment. As we understand the case, the terms of the contract are not in dispute. It is admitted in the answer that defendant did contract and agree with plaintiff to sell him the lands for the sum of $1,550. It is alleged in the answer that the plaintiff failed to comply with the agreement. But whatever the terms of the contract were, the jury have found that the plaintiff complied with its terms.

Under this issue it was open to both parties to introduce evidence to prove the terms of the contract, as well as to whether they were complied with by plaintiff.

The form of issues is of little consequence if the material facts at issue are clearly presented by them. *Paper Co. v. Chronicle,* 115 N. C., 147.

The discretion of the judge in settling issues will not be reviewed by us if under the issues presented the parties have opportunity to offer evidence upon every material phase of their contentions. *Redmond v. Mullenax,* 113 N. C., 505.

The court was not compelled to submit to the jury an issue as to whether the defendant did contract to sell the land to plaintiff, for that

was admitted in the answer, and therefore no such issue was raised by the pleadings, and only issues should be submitted that are raised by the pleadings. The only dispute related to the terms of the contract, and as to whether the plaintiff complied with them. The issues submitted cover every issue raised by the pleadings, and when construed with reference to the admissions in the answer are amply sufficient to support the judgment.

If defendant was dissatisfied with the form of the issues, he should have excepted and submitted other issues.

We find in the record no issues tendered by defendant, and no exception to those submitted, and no assignment of error relating thereto.

Where an issue involved by the pleadings was not tendered, and the issues submitted were not objected to on the trial, a party in such default cannot complain for the first time in this Court. *Maxwell v. McIver,* 113 N. C., 288; *Porter v. R. R.,* 97 N. C., 66; *Clements v. Rogers,* 95 N. C., 248.

We think this controversy one of fact almost exclusively, and that it has been settled by the verdict of the jury. There is only one assignment of error relating to the evidence, and two to the charge, and we think they are without merit and need not be discussed. The controversy was put to the jury clearly and fairly.

No error.

THE BANK OF UNION v. S. N. STACK ET AL.

(Filed 5 May, 1920.)

1. Evidence—Surrounding Circumstances—Appeal and Error—Trials.

While evidence should be rejected upon the trial which merely tends to excite prejudice, or is conjectural or remote, it is not required that it bear directly on the question at issue, and it is competent and relevant if it is one of the circumstances surrounding the parties and necessary to be known to properly understand their conduct and motives, or to weigh the reasonableness of their contentions.

2. Same—Bills and Notes—Negotiable Instruments—Principal and Surety—Mortgages—Release—Conditions.

There was evidence tending to show that an endorser at the bank of a note did so upon condition that the holder of a mortgage note from the same maker would release the mortgage, so that the note presently given should be a first mortgage on the property, and that the bank knew of this transaction and agreed thereto upon consideration that a certain indebtedness of the mortgagee to the bank be paid with a part of the proceeds of the note, and an officer of the bank testified that the transaction had been made unconditionally, and not conditionally upon the

cancellation of the prior mortgage: *Held*, competent for defendant surety to show that the mortgagor was insolvent at the time of the transactions, as bearing materially upon the credibility of the plaintiff bank's contention that it would not have thus surrendered a solvent paper, and the counter proposition that this paper was of no value.

3. Courts—Verdict Set Aside—Evidence—Matters of Law—Appeal and Error—Objections and Exceptions—New Trials—Judgments.

Where the judge erroneously overrules as a matter of law his previous ruling upon the admission of evidence, as the basis for setting the verdict aside, the order vacating the verdict will be set aside on appeal, with direction that judgment be entered on the verdict, and when so entered the appellant may then have the right of appeal and present his exceptions taken on the trial.

APPEAL by defendants from *Lane, J.*, at the August Term, 1919, of UNION.

This is an action on a note for $540.75, executed by L. S. Small as principal, and the defendant, S. N. Stack, as surety.

The execution of the note was admitted, but the defendant alleged that the delivery of the note was conditional.

Small, the principal in the note, was indebted to S. L. McManus in the sum of about $1,100, secured by a chattel mortgage. McManus was about to foreclose his mortgage, but upon Small requesting further indulgence, agreed that if he, Small, would pay $800 cash he would carry the balance another year. Small stated to McManus that he had only $300 in cash, and McManus then suggested that if Small would borrow $500 he would release his chattel mortgage in favor of the lender of that sum.

Small then went to the plaintiff bank to borrow $500, and the bank agreed to lend that sum if the defendant Stack would sign Small's note, and if he could retain out of the $500 a note for $268.61 held by the bank against McManus, to which McManus agreed. Small then went to see the defendant Stack to get him to sign the note as surety.

The defendant offered testimony tending to prove that he did sign the note upon the agreement that McManus would release his mortgage, and that the bank should take a first mortgage on the property as security for the note; that the bank was informed of this agreement.

Small testified, among other things: "I carried this note to the bank. Dr. Funderburk went with me. I left the note with Mr. Blakeley and told him *to keep it until Mr. McManus released his chattel mortgage, or canceled it, so that the one I gave the bank would be a first lien on the property. Mr. Blakeley agreed to do this,* and I told him if Mr. McManus canceled this paper or released it so that the mortgage I gave the bank would be a first lien I would give McManus a check, and if he received my check at the bank he might know the arrangements had

gone through. If he did not receive the check, *then he could hold the papers and I would get them some time when I was in Monroe. He said he would do this,* and told me to be sure not to make any check unless I got the arrangements through with McManus."

The president of the bank testified, in behalf of the defendant, in substance, that the note was delivered absolutely and without conditions, and that, as soon as the transaction was completed, he marked the McManus note paid, and sent it to McManus and gave Small credit for the balance of the $500.

McManus was introduced as a witness for the plaintiff, and upon cross-examination stated, over the objection of the plaintiff, that he was insolvent at the time of these transactions, to which the plaintiff excepted.

The jury returned the following verdict:

"1. Did the defendant execute the note sued on in this action? Answer: 'Yes.'

"2. In what amount, if any, is defendant indebted to plaintiff on said note? Answer: 'Nothing.'"

The plaintiff moved to set the verdict aside, and for a new trial.

The motion to set the verdict aside, and for a new trial for errors of law, and that the verdict is against the weight of the evidence, came on to be heard.

The court set aside the verdict as matter of law, for that it erred in admitting evidence of the insolvency of Samuel McManus.

To this the defendant excepts, and appealed to the Supreme Court.

Stack, Parker & Craig for plaintiff.
R. B. Redwine for defendant.

ALLEN, J. The relevancy of evidence is frequently difficult to determine, because men's minds are so constituted that a circumstance which impresses one as having an important bearing on a controverted issue, appears to another to have no probative force.

All the authorities are agreed that if the evidence is merely conjectural or is remote, or has no tendency except to excite prejudice, it should be rejected, because the reception of such evidence would unduly prolong the trial of causes, and would probably confuse and mislead the jury, but it is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.

Greenleaf says (1 Green. Ev., sec. 51a): "It is not necessary that the evidence should bear *directly* on the issue. It is admissible if it *tends* to prove the issue or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it."

Taylor (1 Tay. Ev., sec. 316): "While he (the judge) shall reject, as too remote, every fact which merely furnishes a forceful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble light on the question in issue.

"The circumstances of the parties to the suit, and the position in which they stood when the matter in controversy occurred, are generally proper subjects of evidence; and, indeed, the change in the law enabling parties to give testimony for themselves has rendered this proof of surrounding circumstances still more important than it was in former times."

Jones (1 Jones Ev., sec. 138): "It has been demonstrated that testimony, obviously collateral to the issues, which would merely tend to prejudice the jury, must be rejected; but where there is such logical connection between the fact offered as evidence and the issuable fact, that proof of the former tends to make the latter more probable or improbable, the testimony proposed is relevant, if not too remote. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry or to assist, though remotely, to a determination probably founded on truth.' Where there is a conflict of testimony of witnesses, evidence is admissible of collateral facts, which have a direct tendency to show that the testimony of one set of witnesses is more probable than that of the other."

Applying this principle, we are of opinion that the evidence of the insolvency of McManus was competent and relevant.

The question in issue was whether the note in suit was delivered to the plaintiff bank with or without conditions.

The president of the bank testified that there were no conditions; that the delivery was absolute, and that according to the agreement between the parties he used a part of the proceeds of the note to pay a note which McManus owed the bank, and canceled and surrendered the McManus note.

In the absence of other evidence, the McManus note, on which the bank had loaned money, would be accepted as solvent paper, and the fact that the bank had surrendered a valuable asset at the time of the transaction would be a circumstance tending to corroborate the evidence of its president.

It might well be argued, and with much force, that the evidence of the president must be true, and the delivery unconditional, as otherwise he would not, at the time when the transaction was fresh in mind, have surrendered a solvent paper, which he would not have had the right to do if the note in suit had been delivered, conditionally, and to meet this view it was competent to prove that the makers of the note surrendered were insolvent, and that the bank parted with nothing of value.

It follows, therefore, as the evidence of insolvency was properly admitted, that the ruling of his Honor, setting aside the verdict as matter of law because of its admission, was erroneous. Let the order vacating the verdict be set aside, and let judgment be entered on the verdict for the defendant, and when so entered the plaintiff will have the right of appeal, if so advised, and to present its exceptions taken on the trial.

Reversed.

M. H. CALDWELL, RECEIVER FOR THE FRANKLIN PARK IMPROVEMENT COMPANY v. C. H. ROBINSON, F. J. ROBINSON, A. J. HILT, T. W. WHITMIRE, AND G. A. SMITH.

(Filed 5 May, 1920.)

1. Appeal and Error—Reference—Findings—Evidence—Transcript.

When the evidence upon which a referee has based his findings of fact do not appear in the transcript of the case on appeal, the Supreme Court will not review such findings, and they will be sustained.

2. Reference—Evidence—Courts—Findings.

The trial judge may reverse the findings of fact of a referee upon evidence supporting his ruling as to essential facts, and affirm him as to others.

3. Corporations— Officers— Transaction— Evidence—References—Courts —Findings.

The purchasers of land formed a corporation among themselves, to which the land was conveyed at double the price they paid for it, and under reference the evidence tended to show that at the time the individual purchasers *bona fide believed*, upon the opinion of disinterested persons of good character, after due inquiry and inspection of the property, that it was reasonably worth, on the market, the price at which the corporation became the purchaser; and it appeared that there were then no creditors of the corporation. Upon a reference it was found by the referee that the defendants, the individual purchasers of the land, had knowingly and fraudulently overvalued the lands they had conveyed to the corporation, and were liable for their unpaid subscription to its stock, including certain of its notes it had given to the incorporators in part payment for the lands: *Held*, there was evidence sufficient to sustain the trial judge in setting aside this finding of the referee, and finding that

the defendants believed the price to be a fair and reasonable one, and rendering judgment for defendants; and the exception that the judge had set aside the referee's finding without substituting one in its place, is untenable.

4. Same—Fraud.

There is no element of fraud in a transaction where the incorporators have *bona fide* sold lands to a corporation formed by themselves, at an advanced price, but at a reasonable valuation, believing it to be such, and there were no creditors of the corporation or other stockholders at the time. The principle that the directors and officers may not take advantage of the creditors of the corporation by their secret or superior knowledge of its affairs, does not apply to the facts of this case.

5. Same—Judgments—Estoppel—Liens.

Where the incorporators have sold to a corporation they have created their lands at an advanced but reasonable price, without fraud or collusion between themselves, and have taken the notes of the corporation in part payment, and later obtained judgments against the corporation thereon, the remedy was by appeal, if the judgments were erroneous, or if irregular, by motion to set them aside, or if void, as fraudulent, or for any other reason, by proper proceedings to attack them; but the judgments standing unimpeached are prior liens on the lands within the county where they are docketed, as against the rights of subsequent creditors.

6. Corporations — Officers — Transactions — Mortgages— Subrogation— Equity.

Where the incorporators have *bona fide* sold to a corporation they had formed, and in which they were the only shareholders, their lands at an advanced but reasonable valuation without fraud or collusion, and when the corporation owed no debts, and have personally assumed a mortgage of the corporation on the land, and have paid the same, they are subrogated to rights of the mortgage creditors in the lien under the mortgage.

CIVIL ACTION, tried before *Harding, J.,* at April Term, 1919, of CABARRUS, upon exceptions to referee's report.

In January, 1909, the Franklin Improvement Company owned the Franklin Hotel, with the lot on which it was built, containing 3½ acres, with other buildings thereon, and about 75 acres of adjoining land, situated in or near the town of Brevard, Transylvania County. On 7 January, 1909, the defendants purchased said real property, and the furniture in the hotel, at the price of $35,000, through the defendant, T. W. Whitmire, acting as their agent, he having been instructed to negotiate for a purchase of the property at the lowest price, which was found to be $35,000. The defendants agreed to take the property at that price, "after having carefully inspected the same, and after being advised by reliable persons that it was worth more than twice that much," or as much as $77,000, and at the time they bought the property they believed that their grantor was selling it at a great sacrifice on account of its

then financial condition, and they further believed, after making proper inquiry, that it was worth more than twice the amount they were to give for it, and as much as $77,000. The Franklin Improvement Company conveyed the property to the defendants on the day aforesaid for the price agreed upon, consisting of $12,000 in cash, and the assumption by the defendants of an outstanding mortgage on the property to secure a debt of the improvement company amounting to $17,500, making $30,000, the remaining $5,000 having been paid by an arrangement between T. W. Whitmire and the improvement company. "That T. W. Whitmire failed to pay his part of the purchase money, or $5,000 (except as above indicated), but the other defendants, C. H. Robinson, F. J. Robinson, G. A. Smith, and A. J. Hilt did not know this at the time, and in good faith believed that defendants were paying the full amount of $35,000 for the property, as stipulated, instead of $30,000, as they later ascertained. A corporation was then formed by the defendants, who were its officers and directors and stockholders, under the name of "The Franklin Park Improvement Company," and the defendants conveyed all of the property to it at the price of $77,000, receiving in payment of the purchase money $35,000 of its stock at its par value, $24,500 of its notes, and the company assuming the payment of the debt of $17,500 secured by the mortgage on all its property. The latter debt was afterwards taken up, the defendants advancing for the company the sum of $6,000 contributed by them severally, and in different amounts, for which the company afterwards gave its notes to them, and the balance of $8,000 was borrowed by the company, and a deed of trust executed to Mr. Julius C. Martin, with power of sale to secure the same on the hotel, and 14 acres of the land. The $6,000 was entered on the books of the company as money advanced by the respective defendants to pay off the $17,500 debt secured by the mortgage on all of the property, on which certain payments had before been made, thereby reducing the amount of the same. The company paid the original purchase money notes from the sale of lots, and defendants reduced their notes for the $6,000 to judgment, to which were afterwards applied, in payment thereof, the proceeds of the sale of the hotel and the 14 acres of land, which were not required to pay the secured debt under the deed of trust to Mr. Martin. These transactions took place before the alleged claim of Gilmer & Moore, mentioned below, accrued, there being no creditors of the company at the time except the defendants, who were then solely interested in the same.

The claim of Gilmer & Moore arose out of a contract, by which the company leased the hotel and its furniture on 29 March, 1912, to them, with an option to buy the same, which they alleged was breached by a sale of the property, on 4 or 12 November, 1912, by Mr. J. C. Martin,

as trustee, and they contend that they became creditors of the company on that day. The defendants, on the contrary, contend that they did not become creditors until their claim was reduced to judgment in 1915. The lease and option contract were guaranteed by C. H. Robinson and G. A. Smith, as Moore and Gilmer alleged, and the judgment in favor of the latter was obtained in a suit against the company and the guarantors, the facts and results of which will appear by reference to the case of *Gilmer & Moore v. Franklin Park Improvement Company,* reported in 170 N. C., at p. 452.

The case was referred, it seems, by consent, and the referee made his report to the court in which he found, as a fact, among other things, that the defendants had knowingly and fraudulently overvalued the real estate conveyed to the company by them in payment of their stock subscription and bonds, and he held that they were liable to the company for said subscriptions as unpaid, and, therefore, to the plaintiffs as its receiver, for the payment of the Gilmer & Moore judgment, and for the cost. When the case was heard by Judge Harding, he reversed the findings of the referee, and found that the property sold to the company by the defendants was not knowingly and fraudulently overvalued, but that $77,000 was believed to be a fair and reasonable price therefor, and after making other findings, not material to be here stated, he gave judgment for defendants, and plaintiff, after filing exceptions, appealed to this Court.

H. S. Williams and R. D. Gilmer for plaintiff.

Thaddeus A. Adams, L. T. Hartsell and Cansler & Cansler for defendants.

WALKER, J., after stating the case: The testimony, upon which Judge Harding based his findings of fact, is not in the transcript, and we must therefore assume that there was sufficient evidence to support them, and this being so, they must be sustained, as we do not review findings of facts in such a case. *Dorsey v. Mining Co.,* 177 N. C., 60, and cases cited; *Thompson v. Smith,* 156 N. C., 345. It was said in *Thompson v. Smith, supra:* "If there is any evidence to support the findings, and no error has been committed in receiving or rejecting testimony, and no other question of law is raised with respect to the findings, we accept what the judge has found as final, as we do in the case of a jury." citing *Malloy v. Cotton Mills,* 132 N. C., 432; *Lambertson v. Vann.* 134 N. C., 108; Clark's Code (3 ed.), p. 564, and cases there collected; *Ramsey v. Browder,* 136 N. C., 251, *Comrs. v. Packing Co.,* 135 N. C., 62. The judge acted within his power when he reversed the referee as to the essential facts, although he may have affirmed him in some unimportant re-

spect. *Dumas v. Morrison,* 175 N. C., 431; *Cummings v. Swepson,* 124 N. C., 579; *Miller v. Groome,* 109 N. C., 148; *Highland v. Ice Co.,* 84 S. E. 252. The second exception is untenable because, though the judge set aside the referee's findings as to there being no consideration for the $24,000 of bonds issued by the company to the defendants, he did not fail, as alleged in the exception, to substitute a finding in its place, as he had already found that the property conveyed to the company by the defendants was not sold to it knowingly and fraudulently at an overvaluation, but *bona fide,* and honestly, the defendants believing at the time, after carefully inspecting the property, and after having made due inquiries as to its true value, that "it was reasonably worth, on the market, the sum of $77,000, this having been the testimony of disinterested witnesses, admitted to be of good character, that it was worth, at that time, all of that amount, and that no witness testified to the contrary."

The emphatic language of the judge leads us to interpret the findings to mean that the property was fully worth what the defendants charged the company for it, and that they honestly and in good faith believed that it was of that value. But if that was not its real value, it has certainly been found as a fact by the judge, taking any reasonable view of his language, that they honestly, and in good faith, believed it to be its real value, and there is no evidence before us to the contrary, nor is there any to show that $77,000 was not its true value. If it was the full value, we do not perceive how there could have been any fraud or misconduct in the transaction to the prejudice of creditors. It is a fact that, when the sale to the company was made, it had no creditors, except the defendants themselves. But the prominent and controlling fact is that they sold the property to the company at a fair and reasonable value, or to put it another way, the company bought it at its true value, and, therefore, got full value for its bonds and stock, the par value of which was $59,500. Judgments were recovered upon the bonds, which were duly docketed in the Superior Court of Transylvania County, thereby becoming liens upon the real property of the company. The judge refused to set aside the judgments as collusive or fraudulent, and we must again assume that there was evidence to support his ruling, as the testimony is not all before us, and the appellant must show error. Besides, it appears, as we have before stated, that the company owed the debts upon which the judgments were taken, and had no valid defense to the action in which they were rendered, and it does not appear that they were unfairly obtained for the purpose of cheating or defrauding the company, or taking any undue advantage of it. If these judgments were erroneous, the remedy was by an appeal; if irregular, by motion to set them aside; if void, as fraudulent, or for any other reason, they could be avoided by proper proceedings. But we do not think the assignments

of error sufficiently raise the question as to their fraudulency, or invalidity, though they do as to the right to docket them in Transylvania County. If they were valid, we do not see why they could not be docketed, under the statute, in that county. The whole case, upon its real merits, rests upon the finding of the judge that the sale of the land and other property by the defendants to the company was not fraudulent, but that the land and other property brought their value, and that the stock and bonds of the company given in payment of the purchase money were, therefore, fully paid for. If this be so, the judgments having been docketed in the county where the land is situated, constituted a lien upon it some time before Moore & Gilmer became creditors of the company. It is contended by the plaintiff that the dealings between the officers and the company were intended as a method for cheating and defrauding creditors, but the court has found against this charge, and there really is no evidence before us to sustain it. At the time of the transactions, there were no creditors to be defrauded except those who were parties thereto, and it could not be said that they intended to cheat themselves, and it is not shown that there was any actual intent to defraud subsequent creditors, or any proof from which such an intent can be inferred. The judge's findings conclusively refute the allegation of fraud.

The doctrine of this Court, and of all others, we believe, is restated in *Wall v. Rothrock,* 171 N. C., 388, 391, as follows: "There is no doubt that a board of directors, unless restricted by charter, may borrow money for the present needs of the corporation, and authorize certain directors to indorse the notes and secure them by mortgage on the corporate property, if done in good faith. . . . There is nothing to hinder a director from loaning money and taking liens on the corporate property to secure him. If he can do that he can lend his credit by indorsing its paper in order to obtain needed cash, and secure himself upon the corporation's property. Such transactions are looked upon with suspicion, and strict proof of their *bona fides* is required. But the directors, occupying a fiduciary relation, are not permitted to secure themselves against preëxisting liabilities of the corporation upon which they are already bound, or for money they have already loaned, when the corporation is in declining circumstances and verging on insolvency. They cannot be permitted to take advantage of their intimate knowledge of the corporation's affairs for their own benefit at the expense of the general creditors," citing *Edwards v. Supply Co.,* 150 N. C., 171; *Powell v. Lumber Co.,* 153 N. C., 56; *Whitlock v. Alexander,* 160 N. C., 479. These cases are in line with others cited to us by the plaintiff, *Pender v. Speight,* 159 N. C., 612; *McIver v. Hardware Co.,* 144 N. C., 478; *Steel Co. v. Hardware Co.,* 175 N. C., 450; *Graham v. Carr,* 130 N. C., 271. The case of *Graham v. Carr, supra,* appears to be decisive of the mate-

rial question raised in our case. The following was there held to be the law, quoting from the head-notes:

"1. A sale by a trustee of *an insolvent corporation* of bonds and capital stock belonging to it to one of its directors, is valid if made in good faith and for full value.

"2. A director of *an insolvent corporation,* being a surety for the payment of corporate debts, cannot apply the proceeds derived from the sale to him of corporate property to the payment of such debts."

Upon the question of over valuation alleged by the plaintiff, it is said in *Whitlock v. Alexander, supra,* at p. 473: "The officers of the corporation are supposed, and are held to act with good sense and reasonable business prudence. In 10 Cyc. it has been said that the belief that a prudent and sensible business man would honestly hold in the ordinary conduct of his own business affairs is what constitutes good faith in the valuation of property for which the stock of a corporation is issued." These principles, when applied to the facts of this case, as found by the judge, are sufficient to justify his conclusion that the defendants are not liable to the plaintiff. If the company was paid full value for its stock and bonds, and especially as defendants at the time were the only creditors, and there was no actual intent to defraud Gilmer & Moore, who are the only creditors for whose benefit this suit was brought, we are wholly unable to see how they can successfully assail this transaction. The case, as it seems to us, is not brought within the principles stated in any of the cases, forbidding officers having superior knowledge of the particular company's affairs to prefer themselves, and thereby impair, or prejudice, the rights of other creditors. But it appears further that the defendants paid, at the company's request, six thousand dollars, in discharge of the debt against the company of $17,500, secured by a mortgage on all of its property, for which debt they were secondarily liable. They were, therefore, subrogated *pro tanto* to the rights and the lien, under the mortgage of the creditors to whom the money was paid. *Publishing Co. v. Barber,* 165 N. C., 478; *Whitlock v. Alexander, supra; L. T. & S. Deposit Co. v. Gomeringer,* 236 Pa. St., 179; *Bushkirk v. Sanders,* 70 W. Va., 363; *Paton v. Robinson,* 81 Conn., 547; *Brinckerhoff v. Holland Trust Co.,* 159 Fed. Rep., 200; 6 Pom. Eq. Jur. (3 ed., 1905), sec. 921. In any view, therefore, Mr. Julius C. Martin, the trustee, under the $8,000 deed of trust, himself an eminent lawyer, decided correctly when he paid the surplus of the proceeds of the sale in his hands, after satisfying the secured debt and costs, to the defendants. We therefore affirm the judgment of the Superior Court.

The reversal of the referee's finding concerning the sale of the hotel property to the company, and replacing it with the finding of the court that the sale was made honestly, in good faith, and for full value, long

before Gilmer & Moore became creditors, and that there was no actual intent to defraud them, appear as the outstanding facts of the case, which are fatal to the plaintiff's recovery.

In regard to the defendants' appeal, as to the legal effect of the judgment in *Gilmer & Moore v. The Franklin Park Improvement Company,* is was agreed that if the decision in the plaintiff's appeal is affirmed, the defendants' appeal should be dismissed, and it is so ordered.

Plaintiff's appeal affirmed.

Defendants' appeal dismissed.

C. A. MOORE v. THOMAS J. HARKINS, ADMINISTRATOR.

(Filed 5 May, 1920.)

1. Rehearing—Second Rehearing—Appeal and Error.

A party whose application for a rehearing of the case has been denied may not successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the court in reaching the same conclusion.

2. Same—Opposing Party.

Where a petition to rehear a case in the Supreme Court has been allowed, the opposing party only may petition for a second rehearing thereof.

3. Rehearing—Court's Discretion—Rules of Court—Appeal and Error.

Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. Rule 53.

C. A. Moore in persona for plaintiff.

No counsel, contra.

CLARK, C. J. This is a second petition to rehear, and in fact a third petition, which the plaintiff styles: "A further petition to rehear."

The case sought to be reheard was decided 27 December, 1919, opinion by *Brown, J.* The first petition to rehear was ordered docketed by the two justices to whom it was referred at request of petitioner under Rule 53, and upon consideration by the Court the original decision was reaffirmed and the petition dismissed.

A second petition was sent in, but did not receive the approval of the two justices to whom it was referred, and under the rules of the Court was not docketed, and was returned to the petitioner denied, with a statement from the clerk, by authority of the court, that a second application for rehearing by the same party was not allowable, and the petitioner

was referred to *Nelson v. Hunter,* 145 N. C., 334, where it is said: "A second rehearing is permissible only when on the first rehearing we have reversed or materially changed the opinion that was sought to be reheard, as in *Elmore v. R. R.,* 132 N. C., 865," and the second petition is by the other party.

In this third petition to rehear it is evidence that the petitioner misunderstood the reference to *Elmore v. R. R., supra,* which was cited as presenting the only condition in which a second rehearing was allowable. In *Elmore's case* on the first rehearing the original opinion was reversed, and the second rehearing was allowed on application by the opposite party, and the original decision reinstated.

The rule is almost without exception in the precedents that when a petition to rehear is denied a second petition by the same party is not permissible. Otherwise, as the Court said in *Crawfordsville v. Johnson,* 51 Indiana, 400, in denying a second petition to rehear: "If a second petition for rehearing can be filed by the same party in the same case why may not 10, 20, or 100 petitions for rehearing be filed by the same party in the same case?"

In *Williams v. Conger,* 131 U. S., 390, the Court said that having denied the petition to rehear, "the persistent renewal of the application . . . is not in order, and does not recommend itself to the favorable consideration of the Court." In *Bank v. Grunthal,* 39 Fla., 388, the Court said: "A second application for the rehearing of a cause in the appellate court by the same party, and upon the same ground as a former application that has been considered and denied is irregular and must be denied."

In *Bope v. Ferris,* 88 Mich., 300, it was held that a rehearing not being a matter of right, an order denying a former petition to rehear cannot itself be reheard. To the same purport *Coates v. Cunningham,* 100 Ill., 453. In *Smith v. Dennison,* 101 Ill., 657, it is said: "A second petition for rehearing of a cause by the same party cannot be entertained," citing *Garrett v. Chamberlain,* 100 Ill., 476, and adds: "It matters not that upon the denial of the first petition the court saw proper to modify the language of its opinion previously filed. It is the *decision* of the Court, not so much the reasons which may have been assigned, that is subject for reconsideration upon an application for the rehearing of a cause. If the decision originally made is adhered to on such reconsideration, although the reasons given for it may be modified, or the grounds of decision changed, it will not be open to further review at the instance of the same party." There was no change as to the language, or reasoning, of the opinion in the present case in denying the first petition to rehear, but we give the above citation as applicable in such cases.

In *Newberry v. Blatchford,* 106 Ill., 584, the Court said that after denying a rehearing the Court will not reopen the discussion of the

questions previously determined, on the application of the same party, pointing out that as the Court would not hear the same questions presented by a second appeal in the same case, it would not do so upon an application for a second rehearing. In a later case, *Leathe v. Thomas,* 233 Ill., 430, the Court said: "When a petition for rehearing has been denied another application for rehearing will not be entertained."

"Only one rehearing is granted in any cause, unless matters are decided on the rehearing which had not been previously considered, and are reserved for rehearing." *S. v. Willson,* 37 La. Ann., 737; *Westerfield v. Lewis,* 43 La. Ann., 63. In 3 Cyc., 218, it is said: "A second application for the rehearing of a cause by the same party, and upon the same grounds on which as a former application has been considered and denied, will not be entertained," citing authorities in the notes.

In *Watson v. Dodd,* 72 N. C., 240, the Court said: "The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon petition to rehear unless it was decided hastily and some material point was overlooked or some direct authority was not called to the attention of the Court." See very numerous citations to that case in Anno. Ed. For a stronger reason, when the losing party has had opportunity by a petition to rehear to show that such material point was overlooked, or that some direct authority was not called to the attention of the Court, or that the case was decided hastily, and has failed to so satisfy the Court, he should not be again heard upon another petition to rehear.

Interest republicae ut sit finis litium. When a party, by reason of a nonsuit or otherwise, renews his action on the same ground again and again, before a magistrate, or before the Superior Court, the courts will prevent a defendant (who has some rights) being oppressed or annoyed by vexatious litigation, and will restrain the persistent plaintiff from bringing further action by a bill of peace. Certainly the courts should not permit a party to renew his litigation by petition to rehear unless the petition is well founded, and when it has once decided that it is not, it cannot be again presented by a second, or in this case a third, application to rehear.

It appears from the opinion of *Brown, J.,* in this case, *ante,* 167, that this matter has occupied its full share of the time of the courts. He says, "The identical cause was before this Court in a case between the same parties at Spring Term, 1916, 171 N. C., 697," and the action was dismissed. "Another action was brought 5 November, 1914, and tried before Harding, J., February Term, 1916, in which a judgment of nonsuit was entered, the cause of action being based upon the same drafts or assignments."

"Another action was brought 24 February, 1917, based upon the same cause of action, and was tried April Term, 1918, before Stacy, J., upon

the following issues: 'Is the defendant indebted to the plaintiff, and if so, for what amount? Answer: No.' '2. Is the plaintiff's claim barred by the statute of limitations. Answer: No.'

"The court set aside the verdict of the jury as to the second issue, and ordered judgment against the plaintiff upon the first issue. . . . An appeal was taken to this Court, and appears in 177 N. C., 114. In closing its opinion, the Court said: 'We think the charge on the first issue was correct, and practically reduced the controversy to one of fact, which has been settled by the jury's finding on the first issue.'"

The opinion in this case, *ante,* 168, citing 171 N. C., 697, and 177 N. C., 114, between the same parties, was very carefully and considerately written. The first petition to rehear it was docketed by leave of the two judges to whom it was referred, and upon reconsideration of the Court it was denied. The second and third petitions to rehear, as held in the authorities above cited, are "irregular and cannot be entertained." We have been thus full in discussing the matter out of consideration to the plaintiff, who is fully satisfied that this Court has been in error all along, but he has had his constitutional "day in court"—several days in fact. We decided the case according to what we believe correct, and we deem it now due to the defendant, and every defendant in like case, that he should not be further vexed by litigation over the same subject-matter, and that other litigants should have opportunity to be heard.

An appeal is a matter of right, but a petition to rehear is not. It is a matter in the discretion of the Court, and must be exercised according to the rules prescribed by this Court (Rule 53), which has sole control of its own practice and procedure, *Herndon v. Ins. Co.,* 111 N. C., 384, and cases there cited, and citations to that case in the Anno. Ed. And among these conditions are this that when the Court has granted or has denied a petition to rehear, whether such petition fails by reason of the refusal of the two judges (to whom the matter has been referred by the petitioner) to order it docketed, or is denied by the Court, as in this case, after it is docketed and reconsidered, that is the end of litigation, and no further rehearing can be had upon the application of the same party. This is only permissible as already said, when on the rehearing the former opinion is reversed, in which case the respondent can file his petition to rehear as in *Elmore v. R. R.,* 132 N. C., 865, cited in *Nelson v. Hunter,* 145 N. C., 334.

In this, as in the two previous petitions to rehear, the petitioner is particularly insistent that in the case sought to be reheard he was denied a trial by jury. The merits of the petition cannot be considered, as they were passed upon when we denied the first petition, but we reiterate, as said by *Brown, J., ante,* 169, (the opinion in this case), that the

jury found on the identical cause of action between the same parties in the trial before Stacy, J., April, 1918, against the plaintiff, and on appeal the judgment was sustained, 177 N. C., 114. That is an estoppel by record, and there was no fact to submit to the jury.

Petition dismissed.

KATE M. DENNY AND HUSBAND v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 May, 1920.)

1. Railroads—Negligence—Damages—Fires—Foul Rights of Way—Instructions—Appeal and Error.

Where a railroad company is sought to be held liable for fire damage to land, and there is evidence tending to show that it was caused by a spark from the defendant's engine falling upon its foul right of way, the defendant's actionable negligence does not solely depend upon the condition of its locomotive or the manner in which it was being run at the time, but also upon the obligation of the defendant to keep its right of way clear from inflammable matter, and a charge to the jury which excludes this element of negligence is reversible error.

2. Same—Ordinary Care.

In an action to recover fire damage to land against a railroad company, involving the question of the defendant's negligence in not keeping its right of way clear of inflammable matter, a charge to the jury that the defendant would not be negligent if it exercised ordinary prudence in keeping, or attempting to keep, it so is objectionable as misleading, in failing to explain the defendant's duty and the meaning of the words "ordinary care" or "prudence," and permitting an inference that it was permissible for the defendant to let combustible matter accumulate thereon, to the danger of adjoining owners.

3. Railroads— Negligence— Evidence— Rebuttal— Burden of Proof—Instructions—Damages—Fires.

Where, in an action to recover damages against a railroad company for negligently setting out fire to the plaintiff's land, there is evidence, on the part of the plaintiff, that it was caused by a spark from the defendant's locomotive, falling upon its foul right of way, it is incumbent upon the defendant to establish the fact, by the greater weight of the evidence, that it was not negligent in any of these respects upon which it relies; and this error cannot be cured by construing the charge as a whole, when not incorporated therein.

4. Railroads—Negligence—Damages—Fires—Foul Rights of Way—Acts of Another—Notice.

Where a fire has been communicated by a spark from defendant railroad company's locomotive to combustible matter on its right of way, causing damage to the plaintiff's land, it is not required that the defendant should

have kept its right of way absolutely clear and clean of all inflammable matter to free itself of actionable negligence, if such matter had been placed there by another, for so short a time that the defendant had no notice thereof, express or implied, from length of time, or reasonable opportunity to remove it.

APPEAL by plaintiff from *Calvert, J.*, at the December Term, 1919, of ROBESON.

This is an action to recover damages for burning over the lands of the plaintiffs, one of the allegations of negligence being that the defendant permitted combustible matter to accumulate on its right of way, which was ignited by sparks from the engine of the defendant, and that the fire was thence communicated to the lands of the plaintiff.

There was evidence tending to prove the allegations of negligence relied on by the plaintiffs, and evidence on the part of the defendant tending to prove that the fire originated off the right of way, and was set out by one McMillan on lands he was cultivating.

His Honor charged the jury as follows: "The burden of proof is on the plaintiff to satisfy you by the greater weight of the evidence that the defendant has been negligent, and that such negligence is the proximate cause of the injury complained of, and unless the plaintiff has so satisfied you, you will answer the second issue 'No,' the issue we are now considering.

"The plaintiff alleges that the negligence on the part of the defendant consisted of the keeping of the right of way foul; that is, that it was covered with combustible matter, such as dead weeds, broom sage, etc.; that it was foul on the day in question; that sparks were emitted from a passing engine of the defendant railroad company, and that sparks or fire fell on the right of way setting it on fire, and that the fire spread over the lands of the plaintiff, causing damage thereto.

"The defendant denies these allegations. The defendant denies that the right of way was foul on that day, but says that the fire started at some place off the right of way, and spread over the land in question. In considering this case you will give the defendant just as fair consideration as if it were a natural person, and not a corporation, and whether it is a railroad corporation or not will make no difference to you in arriving at your verdict. The defendant, gentlemen, is not liable even if the fire may have escaped from its engine and burned plaintiffs' land unless the defendant has been negligent in some of the respects set out in the complaint, and that such negligence caused the fire to burn plaintiffs' land.

"(The defendant is not required to keep its right of way absolutely clear and clean of all matter whatsoever, but is only required to exercise

ordinary prudence, which is such prudence as an ordinarily prudent and careful man would exercise under the same circumstances, and if, in keeping this right of way in proper condition, and in its attempts to do so, it exercised such prudence and care, then in this respect the defendant has not been guilty of negligence, and if you find that the fire did catch on the right of way, and the defendant did exercise this degree of care, then, in that respect, defendant would not be liable, provided its engine was properly equipped and operated as required by law.)

"To that portion of the foregoing charge in parentheses, the plaintiffs excepted.

"(The defendant is not required to take such precautions as will prevent the escape of any fire whatsoever from its engine, but is required only to use a skilled and competent engineer and such spark arrester as is, at the time, in general and approved use, and that its engine be operated in a careful manner, and when it has discharged this duty and fire escapes from its engine, but catches on the right of way, the defendant is not liable, for the law says there has been no negligence on its part.)

"To that foregoing portion of the charge in parentheses, the plaintiffs excepted.

"(So if you find from the evidence that the fire did escape from defendant's engine, and that such engine was in proper condition and has a proper spark arrester, and was operated in a careful way by a skilled and competent engineer, and that this fire caught off the right of way and burned over plaintiffs' land, then there is no negligence, and you will answer the second issue 'No.')

"To that portion of the foregoing charge in parentheses, the plaintiffs excepted.

"(Or if you find that the defendant's engine was in proper condition, with a proper spark arrester, and was operated in a careful way by a skilled and competent engineer, but that fire did escape from such engine and caught on the right of way, but the right of way was not in a foul and negligent condition, then even though such fire may have spread to the plaintiffs' premises and burned their property, the defendant would not be liable, and you would answer the second issue 'No.')

"To that portion of the foregoing charge in parentheses, the plaintiffs excepted.

"But though the defendant's engine was in proper condition, with a proper spark arrester, and was operated in a careful way by a skilled and competent engineer, yet, if you find from the evidence, by the greater weight of it, that fire escaped from engine, that the fire caught on the right of way, and that the right of way was in a foul and negligent condition, and thence spread on the plaintiffs' land, then the defendant would be liable, and you would answer the issue 'Yes.'

"The plaintiffs contend, gentlemen, that the testimony tends to show that the land in question lies some distance west of the line of the defendant railroad; that on the day in question the train passed about eleven o'clock in the morning; that soon thereafter, about twelve o'clock, some smoke was seen rising in the vicinity of the right of way; that a large tract was burned over by that fire, including some lands belonging to the plaintiffs. That the burned area, besides plaintiffs' land, extended over adjoining lands up to and including the right of way of the railroad. The plaintiffs further contend that the testimony tends to show that on the day in question the right of way was foul, that the wind was blowing in a westerly direction, and that you should find from the evidence that the fire was started by sparks emitted by the smokestack or ash-pan of the engine, which dropped on the right of way, and that it was thence communicated to the plaintiffs' land.

"On the other hand, the defendant contends that you should not find by the greater weight of the evidence that the right of way was foul, and that the fire started on the right of way by the defendant. It contends further that the testimony tends to show that the engine was equipped with a standard spark arrester; that it was in good condition on that day, and that it was operated by a skilled and competent engineer; the defendant further contends that the testimony tends to show that a fire had burned over the adjoining land; that there had been a fire which had burned over the adjoining land of one Nun Bethune, and the right of way of the defendant ten days before that, and that on the day in question there was nothing upon the right of way to catch on fire, and that a fire did not start on the latter day upon the right of way. That the fire which burned over the plaintiffs' land had its origin in a fire started by Dave McMillan while he was burning off land and plowing in an adjoining field, and the defendant contends that you have a right to infer that the fire started as it contends, by Dave McMillan, spread over the plaintiffs' land, and up to that adjoining the burned area caused by the fire which it contends the testimony tends to show had gotten out ten days before.

"It is for you to say how it is upon all the evidence and on the charge of the court. So that, having in mind all the facts and circumstances as testified to, if you find from the evidence, and by the greater weight of it, that the defendant negligently set fire to and burned the lands of the plaintiffs, as alleged in the complaint, then you will answer the second issue 'Yes.' If you do not so find you will answer the issue 'No.'"

The jury returned the following verdict:

"1. Is the *feme* plaintiff the owner of the lands described in the complaint? Answer: 'Yes.'

"2. Did the defendant negligently set fire to and burn the lands of the plaintiffs, as alleged in the complaint? Answer: 'No.'"

Judgment was entered upon the verdict in favor of the defendant, and the plaintiffs excepted and appealed.

Britt & Britt and McNeill & Hackett for plaintiffs.
McLean, Varser, McLean & Stacy for defendant.

ALLEN, J. The charge that "the defendant is not required to take such precautions as will prevent the escape of any fire whatsoever from its engine, but is required only to use a skilled and competent engineer and such spark arrester as is, at the time, in general and approved use, and that its engine should be operated in a careful manner, and when it has discharged this duty and fire has escaped from its engine and catches on the right of way, the defendant is not liable, for the law says there has been no negligence on its part" is erroneous, because it omits the view of negligence arising from permitting combustible matter to accumulate on the right of way, and under this instruction it was the duty of the jury to exonerate the defendant from liability if the engine was properly equipped with a spark arrester in general and approved use, and was operated in a careful manner by a competent engineer, although the fire escaped from the engine and ignited combustible matter, which the defendant negligently permitted to accumulate on its right of way, which is contrary to all of the authorities in this State.

It was also misleading to charge the jury that the defendant would not be negligent if it exercised ordinary prudence in keeping or attempting to keep its right of way in proper condition, without explaining to the jury the duty imposed on the defendant as to its right of way, and what was meant by proper condition, as the jury might well have understood that ordinary care was consistent with permitting combustible matter to accumulate on the right of way to the danger of adjoining property.

We might, however, hold that these errors were not fatal upon an inspection of the whole charge, and considered as a whole, if it did not appear that throughout the charge the burden has been placed on the plaintiffs, when it is settled by a long line of authorities, beginning with *Ellis v. R. R.*, 24 N. C., 140, and closing with *Williams v. Mfg. Co.*, 177 N. C., 514, that upon proof that the engine of the defendant set out the fire it was incumbent on the defendant to establish the facts by the greater weight of the evidence, freeing it from liability.

"When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff made out a *prima facie* case, entitling him to have the issue as to negligence submitted to the jury, and they were justified in finding negligence unless they were satisfied, upon all the evidence in the case, that in fact there was no negligence,

but that the defendant's engine was equipped with a proper spark arrester, and had been operated in a careful or prudent manner. *Williams v. R. R.*, 140 N. C., 623; *Cox v. R. R.*, 149 N. C., 117." *Kornegay v. R. R.*, 154 N. C., 392.

"The first issue establishes the fact that the defendant destroyed the property of the plaintiff by fire, and from this fact alone the presumption arises that the defendant was negligent. *Ellis v. R. R.*, 24 N. C., 138; *Lawton v. Giles*, 90 N. C., 380; *Manufacturing Co. v. R. R.*, 122 N. C., 881; *Hosiery Mills v. R. R.*, 131 N. C., 238; *Lumber Co. v. R. R.*, 143 N. C., 324; *Deppe v. R. R.*, 152 N. C., 82; *Kornegay v. R. R.*, 154 N. C., 392.

"These authorities place the burden on the defendant to rebut the presumption of negligence arising from proof connecting it with the origin of the fire, by evidence which will satisfy the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated." *Currie v. R. R.*, 156 N. C., 423.

"If this fact (that the engine emitted the spark which caused the fire) had been found by the jury from the evidence, to which the judge referred, it would carry the case to the jury, and it would then devolve upon the defendant to show that the engine was in proper condition, and had been carefully handled, or in default of doing so, to take the risk of an adverse verdict. In other words, the fact that a spark from the engine caused the fire, whether on or off the right of way, is evidence of negligence, though not conclusive, and may warrant a verdict of negligence, in the absence of explanatory proof, so that it behooves the defendant to go forward and offer exculpatory evidence unless there are circumstances appearing in the plaintiff's own evidence upon which he may rely to show care on his part." *Williams v. Mfg. Co.*, 177 N. C., 514.

And it is well also to state what duty is imposed on the defendant in this particular, the performance of which the defendant must show when the origin of the fire is traced to it.

We agree with his Honor that "the defendant is not required to keep its right of way absolutely clear and clean of all matters whatsoever" that may be ignited, nor is it liable because of an accumulation of combustible matter on the right of way, likely to be the cause of injury, if there through some other agency than its own, and for so short a time that the defendant had no notice of its presence, express or imputed from length of time, and no opportunity to remove it.

The first of these propositions is clearly to be inferred from *McBee v. R. R.*, 171 N. C., 112, and the second from *Phillips v. R. R.*, 138 N. C., 12.

It must, however, exercise due care and precaution to avoid injury to the property of others, and to that end must not permit grass and other

combustible matter to accumulate or remain on its right of way in such quantity and of such character "as are liable to be ignited by sparks and cinders from its engines," and cause injury (*McBee v. R. R., supra*), and "so dangerous that it may reasonably be anticipated that injury will occur to adjacent landowners from fires originated thereon from engines being operated on it" (*Thomas v. Lumber Co.*, 153 N. C., 355), and if it fails in this duty, and injury follows, as a result, it must answer in damages under the second rule laid down in *Williams v. R. R.*, 140 N. C., 624, as follows:

"2. If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skilled and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. R. R.*, 124 N. C., 341; *Phillips v. R. R.*, 138 N. C., 12."

For the errors pointed out there must be a

New trial.

O. E. SEAWELL AND J. D. MCIVER v. KATE S. MCIVER, EXECUTRIX OF D. E. MCIVER, DECEASED, AND S. P. HATCH.

(Filed 12 May, 1920.)

1. Trusts—Deeds and Conveyances—Principal and Agent—Trustee—Compensation—Assignment—Debtor and Creditor.

A deed in trust made by a solvent grantor conveying, while sick, all of his property to a trustee for its control and management, with the express power, upon demand, of revocation and reconveyance, with reasonable compensation to the trustee to be ascertained in a specified manner, will be construed to arrive at the intent of the parties, as gathered from the instrument itself, the circumstances surrounding its execution, and *Held*, to be the creation of an agency with compensation to the trustee for the duties he is thereunder required to perform, and not a deed in trust generally for the benefit of creditors.

2. Trusts—Deeds and Conveyances—Principal and Agent—Assignments—Fraud—Judgment—Execution.

Where a deed in trust creates a mere agency for the management of the trustor's estate, the estate of the principal or trustor is not protected from execution under a judgment of a creditor, and the objection that it was in fraud of the rights of creditors is untenable.

3. Same—Assets—Accountability.

Where a trustee is appointed under an instrument creating him a mere agent for the trustor in the management of his estate, and later and under a separate instrument for the general benefit of creditors, the same trustee

is appointed, the trustee, or his estate in the hands of his administrator, is entitled to a credit for the moneys, etc., he has paid to his principal under the terms of the first instrument, and accountable to creditors under the terms of the second one, for all property, etc., that has come into his hands as trustee, and his successor in the trust for the conduct of the estate while under his management.

4. Trusts—Deeds and Conveyances—Principal and Agent—Assignments—Bills and Notes—Endorsers—Judgments—Liens—Credits—Execution.

A deed created the trustee a mere agent for the trustor, and he was appointed a trustee in a later deed for the general benefit of creditors, and fraud, in the present action, was alleged in the execution of the former deed: *Held*, there being no fraud, as alleged, a bank, made a party defendant, is entitled to recover against the sureties on the note of the maker of the deeds in trust, acquired in due course, subject to whatever credits may be payable thereon in distribution of the assets among the general creditors; and that the lien of the judgment continues, subject to the right of the defendant bank, in the future to apply for leave to issue execution should the same then be deemed by it to have become necessary, but otherwise to be stayed until the termination of the action.

5. Appeal and Error—Costs.

When the appeal is reversed by the Supreme Court, with direction for the restatement of an account between the parties, the appellee will be taxed with the cost thereof.

CIVIL ACTION, tried before *Connor, J.*, at the November Term, 1919, of LEE.

With this action were consolidated certain cases against the same defendants in which the Moffitt Iron Works Company, Indian Refining Company, Maryland Rubber Company, Sanford Grocery Company, J. F. Hollingsworth, and American Sawmill Machinery Company are plaintiffs.

The proceeding was brought in the Superior Court of Lee County, and was heard at different times by Judges Stacy and Connor. The cause was referred to a referee who heard the same and made his report, together with his findings of fact and law. Many exceptions are filed and passed upon by the Superior Court. From the findings and judgment of the Superior Court both parties appealed to the Supreme Court.

R. L. Burns and Hoyle & Hoyle for plaintiffs.

Williams & Williams and J. S. Manning for defendant Kate S. McIver, Executrix.

Seawell & Milliken for defendant J. R. Jones.

Teague & Teague and Robert W. Winston for Banking and Trust Company.

BROWN, J. This is an action originally brought by the plaintiffs, O. E. Seawell and J. D. McIver, against Kate S. McIver, executrix of

D. E. McIver, trustee of W. H. Burnett and J. R. Jones, substituted trustee for an accounting under certain alleged deeds of trust claimed to have been made for the benefit of creditors of W. H. Burnett. The two plaintiffs aforesaid were endorsers on certain notes set out in the pleadings executed by W. H. Burnett to them and endorsed by them to the aforesaid banks. These endorsers bring this action for the purpose of having the assets in the hands of the defendant, and with which they may be chargeable, accounted for and applied to the payment of these notes. It appears to be admitted that on 22 August, 1910, W. H. Burnett executed a paper-writing conveying all his property to D. E. McIver, which it is claimed by the plaintiffs constituted a valid deed of assignment for the benefit of creditors, and that the executor of D. E. McIver is accountable to them for all of said property received by her intestate and not paid over to creditors. It appears that McIver turned over to Burnett the larger part of the said property, and that he has accounted to creditors for none of it received by him under the deed of 22 August, 1910.

It is admitted that on 8 April, 1912, Burnett was insolvent, owing sums of money to various parties, and that Burnett executed a valid deed of assignment for the benefit of creditors which was duly registered. It is admitted that McIver, as trustee, operated under this deed of 1912 until his death on 5 September, 1913. On 24 September, 1913, he was succeeded by defendant, J. R. Jones.

Under the rulings of the Superior Court all of the property of the said Burnett received by McIver under the deed of 22 August, 1910, has been charged against his estate. This includes a number of items which it is unnecessary to set out as the accounts must be stated again. The construction placed by this Court upon the deed of 22 August, 1910, will settle most of the questions presented on both appeals. It is contended by the plaintiffs that it is a conveyance to McIver in trust of all of Burnett's property, and which the trustee was obliged to hold primarily for the benefit of creditors. The defendant, Mrs. McIver, contends that said deed is nothing more than the creation of a mere agency; that Burnett was in bad health at the time of its execution, and executed it for the sole purpose of having his estate managed during his illness.

Upon a careful examination of the instrument, we are of the opinion that it was not an assignment for the benefit of creditors, but created simply an agency to manage the estate and property of Burnett, and to pay his current debts and obligations from time to time, and generally to manage the estate during his illness. According to its specific terms, the instrument was revocable by the maker thereof at any time, which is inconsistent with a deed of assignment for the benefit of creditors. The deed contains the following provision, which, in our opinion, renders it entirely inconsistent with a deed in trust for the benefit of creditors:

"And the said D. E. McIver, trustee, hereby agrees and binds himself, his heirs and executors and administrators to reconvey the above described property of the proceeds thereof, or so much thereof as may be in his hands to the said W. H. Burnett, upon his request, after reserving his reasonable compensation for services rendered, by virtue of and under this deed of trust; and the said D. E. McIver, trustee, shall receive for compensation for services rendered pursuant to and by virtue of this deed of trust such reasonable sum as may be agreed upon between the said W. H. Burnett, or his personal representatives; and if the said parties are unable to agree upon the amount of the said compensation, the same shall be referred to the clerk of the Superior Court of Lee County, whose decision as to said amount shall be final and binding upon the parties."

The authorities are uniform to the effect that "There must be an absolute transfer of title to the assignee without any right of redemption. In other words, there must be a surrender of all right and control, and an absolute appropriation by the debtor of the property to raise a fund to pay his debts. The mere transmission of custody and management is not sufficient." Corpus Juris, vol. 3, p. 1051, and note 54.

There is nothing in the deed showing an intent to make "an absolute appropriation by the debtor of the property to raise a fund to pay his debts." Nor is there anything in it from which it can even be inferred Burnett "surrendered all right and control" over the property. On the contrary, it specifically provides the trustee shall reconvey the property or proceeds to Burnett upon request: a control and authority superior to that of the trustee, to be exercised on demand by Burnett.

It is admitted that at the time Burnett executed the said instrument he was solvent. It was not made for the benefit of creditors, and there is nothing in it which would prevent a creditor from taking judgment and levying execution upon the property in the hands of McIver, as much so as if the instrument has never been executed. It cannot be supposed for a moment that it was contemplated that a solvent debtor could make an assignment for the benefit of creditors, reserve the right to revoke the instrument at any time, and at the same time withdraw his property and shield it from the levy of an execution. *Ames v. Sabin*, 107 Fed. Rep., 582; 5 Corpus Juris, 1051; *Farwell v. Cohen*, 138 Ill., 216; *Holmberg v. Dean*, 21 Kan., 73.

The contention of the plaintiff that if the instrument is not a deed of assignment for the benefit of creditors it was fraudulent and void, is without force, inasmuch as the property is not protected by the instrument from the levy of creditors, and it is admitted that when it was made, the maker was solvent.

We think that the intent of the parties, as gathered from the instrument itself, the circumstances surrounding its execution, etc., in the

recitals of the premises, the nature of authority conferred on the trustee, power of revocation by maker and purpose stated therein, show conclusively it was an agency contract for D. E. McIver, trustee, to act for Burnett, and "generally to manage the estate and property of the said Burnett so as to conserve the same so long as this deed of trust shall remain in force and effect."

It follows from this view of the instrument that all the items with which the executrix, Mrs. McIver, has been charged for property turned over to Burnett by her testator under the instrument of 1910, and all other items of debit and credit growing out of transactions under that instrument, should be eliminated.

We are of opinion that the rulings of the judge refusing to allow commissions to McIver under the deed of 1910 are based upon the idea that it was a deed of trust for the benefit of creditors, and are consequently erroneous. It being a contract of agency, McIver is entitled to a reasonable sum for his services as agent, and if that cannot be determined now in the manner prescribed by the instrument, it may be fixed by the referee and the court. The ruling of his Honor was evidently based upon the idea that McIver was derelict in turning the property back into the hands of Burnett, which we have held it was McIver's duty to do whenever Burnett demanded it. The deed of 1912 was a valid assignment for the benefit of creditors, and under it the estate of McIver is accountable for all the property recovered by him and his successor, Jones, is accountable for the conduct of the estate while it was under his management, and for what property he received. The Court is of opinion that Jones should be allowed certain expenses incurred by him in operating under the deed of 1912, and that he is not chargeable with the $3,000, Farrell notes.

The Court is of opinion that under all the circumstances the Superior Court properly awarded judgment in favor of the defendant Bank and Trust Company against the endorsers upon the notes, who are parties to this action. In this respect we find no error in the judgment.

The judgment of the Superior Court is reversed except so far as stated in this opinion. The cause is remanded to the Superior Court to have the account restated in accordance with this opinion. The costs of this Court will be taxed against the plaintiffs.

Reversed and remanded.

The execution upon the judgments rendered in favor of the Bank and Trust Company against the plaintiffs will be stayed until this litigation is ended, and it is ascertained what amount the said judgments shall be credited with. The stay of execution will not affect the lien of said judgments nor the right of the said defendants to apply for leave to issue execution in case it may be deemed necessary.

R. E. HARRILL v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 12 May, 1920.)

Carriers of Goods—Connecting Lines of Carriage—Misrouting—Delays—Negligence—Conversion—Acceptance of Goods—Damages.

Where an initial carrier has accepted a shipment for a designated routing to the shipper's address, and by reason thereof the shipper did not find them at the designated terminal or otherwise within several months, and then orders them returned to the initial point of shipment where he afterwards accepted them, this acceptance, however long or inexcusable the carrier's delay, precludes the idea of a conversion by the carrier, and its responsibility for the full value of the goods, and the shipper may only recover damages caused by the misrouting, including those caused by the reshipment, and the damages to the goods by the defendant's wrongful conduct.

CIVIL ACTION, tried before *Shaw, J.*, at December Term, 1919, of GASTON, upon the following issue:

"What amount of damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,900.'"

The court in its discretion reduced the amount to $1,000. Defendant appealed.

S. J. Durham for plaintiff.
Walter H. Neal for defendant.

BROWN, J. The plaintiff, a printer of Boiling Springs, N. C., shipped by the defendant a printing outfit of type, press, etc., to New York City. He ordered the routing over the Seaboard and other carriers with the Pennsylvania Railroad as the last carrier to New York City. The plaintiff went to New York, applied to the Pennsylvania Railroad for his property, but it could not be found. It turned out that it had been shipped over another route in which the Pennsylvania was not the last carrier. The goods were found about four months after the shipment. About two months after the shipment plaintiff filed his claim with the defendant for damages. The plaintiff returned to North Carolina at Gastonia on 24 April, 1917, and directed the defendant to return the freight to Gastonia by a certain route, which was done. The defendant obeyed these instructions. This is shown by a letter which the plaintiff offered in evidence.

Some of the goods reached Gastonia on return trip and were found in the freight depot of Southern Railway, and thereupon due notice was given to the plaintiff of the arrival of the goods.

The plaintiff said that only a part of these goods arrived, and the value of what did arrive was only about one-third of original value of $333.33.

The goods were sent from Gastonia by the Southern over to Charlotte for the "Old Hoss" sale to cover freight and storage charges.

These facts are taken from the brief of the counsel for the defendant, and in plaintiff's brief are admitted to be correct.

The court charged the jury as follows: "Now if you find he filed his claim in writing, gentlemen, with the Seaboard Railway Company in the city of New York, as contended by him, and that he had an agreement with the defendant that it should be routed, as alleged in the complaint, over the Seaboard and Pennsylvania roads, and, also, if you further find from the greater weight of the testimony, from the greater weight of the evidence, that the defendant breached that contract, diverted and shipped it over another line, the court instructs you that the plaintiff would be entitled to recover the reasonable market value of the property here."

In this charge we think there was error.

It is true that the evidence shows that the goods of the plaintiff were shipped to New York City by route other than that designated by the plaintiff. Thinking that these instructions had been obeyed, he applied at the Pennsylvania office for his goods. In consequence of having been misrouted they were in the possession of another terminal carrier in the city of New York.

Nevertheless the goods were found after about four months, and after the plaintiff had filed his claim for damages. The plaintiff did not refuse to receive the goods, but directed that the defendant ship them to his order at Gastonia, N. C., over a route specified by the plaintiff.

It is claimed that in consequence of the delay in shipping the goods to New York, caused by the misrouting, the defendant is guilty of a conversion of the goods, and may be held for their full value. Upon this subject it is said in Hutchinson on Carriers (3 ed.), sec. 1372: "Delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, and can recover from the carrier only the damages which he has sustained by the delay. And a voluntary acceptance of the goods, when there has been an inexcusable delay on the part of the carrier in their delivery, will not preclude the owner from a recover of whatever damages he may have sustained thereby." The text is supported by the citation of a large number of decided cases. In *Wells-Fargo Co. v. Hanson,* 91 S. W. Rep., sec. 321, it is said: "If the carrier, on demand, refuses to deliver a trunk within a reasonable time because it is lost, but it is later found and tendered to the plaintiff, the carrier is not guilty of a conversion."

The case at bar, however, precludes all idea of a conversion, because when the goods were found in New York he received them from the defendant, and directed that they be reshipped to Gastonia, N. C., by route designated by the plaintiff.

Under these circumstances we do not think that the defendant, the Seaboard Air Line, is liable for a conversion of the goods because they were shipped to New York by another route other than that designated by the plaintiff. The defendant is only liable for damages growing out of the delay caused by such misrouting as well as any damages which the goods may have sustained by reason of the shipment to New York, and such damages as he sustained by reason of the reshipment to Gastonia and Charlotte due to the wrongful conduct of defendant.

New trial.

ALBERT J. WITTSON ET AL. v. H. S. DOWLING ET AL.

(Filed 12 May, 1920.)

1. Municipal Corporations—Cities and Towns—Streets—Plats—Dedication—Rights Inter Parties.

As between the parties, when the owner of lands has had them platted, showing lots, parks, streets, and alleys, and with reference thereto has sold the lots, or one or more of them, the sale so made will constitute a dedication of the streets, etc., for public use, although not presently opened or accepted or used by the public.

2. Same—Irrevocable Dedication—Estoppel—Equity.

Where the owner of lands divides them into lots, showing thereon streets, etc., it amounts to an irrevocable dedication as it affects purchasers who have taken title to these lots with reference to the plat, the principle being dependent on the doctrine of equitable estoppel, giving such purchaser the right to have the division of the lands into lots, streets, etc., observed in its integrity.

3. Municipal Corporations—Cities and Towns—Streets—Dedication—Public—Acceptance.

So far as a dedication by the owner of lands of streets, etc., platted therein by him concern the general public, without reference to the claims and equities of the individual purchasers of the lots, it is not complete until acceptance by formal action on the part of the properly constituted municipal authorities, or under circumstances by user as of right on the part of the public, etc., but unless and until acceptance has been in some way legally established, it should be more properly termed an offer to dedicate on the part of the owner, and may be recalled by him before acceptance had, and usually is deemed to be recalled by deed in repudiation of the plat, and, at times, by deed from him conveying the land as an

entirety without reference to the plat or any recognition of it, except as to the prior purchasers of the lots who have acquired an equitable right in the streets, which they do not relinquish.

4. Municipal Corporations — Cities and Towns — Dedication — Proposed Dedication—Public—Acceptance—Inter Parties.

The owner of lands had them platted into lots and streets, etc., and having sold several of these lots with reference to the plat, had the purchasers of the lots sold to properly release their equity in the streets, etc., and contracted to sell the balance to a third person who refused the title on the grounds that the vendor could not give title to the streets embraced or platted in the lands he had contracted to buy. No rights of the public in the streets by user or otherwise had been acquired, but, on the contrary, the proper municipal authorities had duly refused to accept the proposed dedication thereof: *Held*, the objection of the obligee to buy was untenable, and he will be required to accept the deed in accordance with his agreement of purchase.

CONTROVERSY without action, heard and determined before *Lane, J.*, at March Term, 1920, of MECKLENBURG.

The question presented in this case is the right of plaintiffs to collect the purchase money for a parcel of land in the corporate limits of the city of Charlotte which plaintiffs, heirs at law of Samuel Whittkowski, deceased, have contracted to sell to defendants for $20,000, on condition that plaintiffs could make an indefeasible fee-simple title to said land, including the portion of the land designated as Meadow's Street and other streets and alleys shown thereon, as they appear in a certain plat, theretofore made by said Samuel Whittkowski, former owner, and recorded in registry office of Mecklenburg County on 14 July, 1905.

Defendants, admitting execution contract and a readiness and ability to pay the stipulated price, resist recovery on the ground that there had been, by reason of said plat, an irrevocable dedication of the streets and alleys, etc., shown on said plat.

There was judgment for plaintiffs, and defendants excepted and appealed.

Cansler & Cansler for plaintiff.
Pharr, Bell & Sparrow for defendant.

HOKE, J. Plaintiffs, devisees and heirs at law of Samuel Whittkowski, deceased, having contracted to sell to defendants a certain piece of land, now within the corporate limits of the city of Charlotte, for $20,000, and defendants resisting recovery on the alleged ground that plaintiffs are not in position to make a free and unincumbered fee-simple title, as required by the stipulations of the contract, the pertinent facts affecting the validity of the title offered are set forth in the case agreed as follows:

"That in 1900 said Samuel Wittkowski owned a tract of land lying in the then suburbs of Charlotte, consisting of a block bounded on the northeast by Elizabeth Avenue, on the southeast by Cecil Street, on the southwest by Providence Road, or East Fourth Street Extended, and on the west by Little Sugar Creek.

"Some time thereafter, and prior to July, 1905, he had this block of land platted into numerous lots, on which plat (which was recorded) were left certain open spaces between the lots, marked 'alleyways,' and another open space 50 feet in width, and extending through the center of the block from Cecil Street to the creek, marked 'Meadow Street,' the whole square being boggy and swampy and lying several feet below the level of the surrounding streets.

"Thereafter the said Wittkowski conveyed two lots off of this block to one Howie by deeds duly recorded in the register's office for Mecklenburg County in 1905 and 1907, respectively. Since the latter date no other lots have been sold by the owners of said block, and no encumbrances whatever has been placed thereon.

"Prior to the submission of this controversy to the court, the said Howie, for a valuable consideration, by deed duly executed and delivered, relinquished all rights of every nature and description, which he may have had in said alleyways and strip of land, designated on said map as 'Meadow Street,' and consented that the owners of said block might perpetually close the same, and use the entire block, with the exception of the two lots sold him, for such purposes as they may see fit.

"Neither prior nor subsequent to the making and recording of said map has the public or any other person used the said so-called 'Meadow Street' or any of the land shown on the said map, as streets or other public or private ways, and if the making and recording of the map amounted to a dedication of said so-called street and alleyways to public use, the proper authorities of said city have never by any act or deed accepted the said dedication.

"The properly constituted authorities of the city of Charlotte, upon having called to their attention the fact that the said map had been made and recorded, did, by resolution duly adopted, prior to the submission of this controversy to the court, absolutely refuse to accept said alleged dedication, or to assume any of the burdens or responsibilities of opening, grading, or maintaining said so-called streets and alleys, for the reason that it was not only impracticable, but unnecessary for the public welfare that the said city should open up, grade, and maintain the same for public use."

It is the recognized principle here and elsewhere that, when the owner of suburban property or other has the same platted, showing lots, parks, streets, alleys, etc., and sells off the lots or any of them, in reference to

the plat, this, as between the parties, will constitute a dedication of the streets, etc., for public use, although not presently opened or accepted or used by the public. *Elizabeth City v. Commander,* 176 N. C., 26; *Wheeler v. Construction Co.,* 170 N. C., 427; *Green v. Miller,* 161 N. C., 25.

In many of the cases on the subject, this is spoken of as an irrevocable dedication, but the principle is dependent on the doctrine of equitable estoppel, giving the purchaser who has bought and taken title in reference to the plat, to have the same observed in its integrity. It is through his position and by reason of it that the equity must be made effective, and, so far as examined, in all the cases where this expression has been used, the purchasers, or some of them, were insisting on their rights in the matter, or were in a position to do so. *Green v. Miller, supra; Hughes v. Clark,* 134 N. C., 457-463; *Collins v. Land Co.,* 128 N. C., 563; *Conrad v. Land Co.,* 126 N. C., 776; *S. v. Fisher,* 117 N. C., 733.

In *S. v. Fisher, Associate Justice Avery* states, we think, the correct principle applicable, as follows: "If he and those claiming under him had sold a single lot abutting on this apparent extension of North Elm Street, he, and those claiming under him, would have been estopped from denying the right of such purchaser and those in privity with him to use the street as laid down in the plat, . . . and this dedication of the easement, appurtenant to the land sold, would have been *as between the parties* irrevocable, though the street had never been accepted by the town for public use," citing *Moose v. Carson,* 104 N. C., 431.

"The estoppel *in pais* arising out of the fact that the grantee in such cases has been induced to part with his money or its equivalent upon the representation of the grantor that a highway would be opened, makes the street as between them what it was represented to be, citing *Grogan v. Town of Haywood,* 4 Fed., 160." And that this is the true character and effect of such a dedication is recognized in the opinion of *Walker, J.,* in *Green v. Miller,* who states the principle as follows: "Where the owner of real property lays out a town or village upon it, or even a plat of ground, and divides it into blocks or squares and subdivides it into lots or sites for residences, which are intersected by streets, avenues, and alleys, and he sells or conveys any of these lots with reference to the plan or map of the property, or where he sells and conveys according to the map of a city or town in which the land is so laid off, he thereby dedicates the streets and alleys to the *use of those who purchase* the *lots,* and also to the public under certain circumstances not necessary to be now and here stated."

In so far as the general public are concerned, and without reference to the claims and equities of the individual purchaser, it is fully understood that a dedication is never complete until acceptance. Usually

creating burdens as well as conferring benefits, the attendant duties may not be imposed upon the public unless it has in some proper way consented to assume them. True, this acceptance may be shown not only by formal action on the part of the authorities having charge of the matter, but, under certain circumstances, by user as of right on the part of the public or other facts, but unless and until acceptance has been in some way established, it should be more properly termed an offer to dedicate on the part of the owner, and may be recalled by him before acceptance had and usually is deemed to be recalled by deed in repudiation of the plat, and, at times, by deed conveying the land as an entirety without reference to the plat or any recognition of it and a user, according to the terms and intent of the deed.

These general positions are recognized and approved in *Tise v. Whitaker*, 146 N. C., 374; *State Co. et al. v. Finley*, 150 N. C., 726; *S. v. Fisher*, 117 N. C., 733, and authoritative decisions on the subject in other jurisdictions are very generally to the same effect. *Dickinson v. Arkansas Imp. Co.*, 77 Ark., 570; *People v. Johnston*, 237 Ill., 237; *Minneapolis, etc., R. R. Co. v. Town of Butt*, 104 Iowa, 198; *Lightcap v. Town of Judson*, 154 Ind., 43; *Schmidt v. City and County San Francisco*, 100 Cal., 302; *The People N. Y. v. Underhill*, 144 N. Y., 316; *Steinauer v. The City of Tell*, 146 Ind., 490.

In *People of N. Y. v. Underhill* it was decided that "to constitute a public highway by dedication, there must not only be an absolute dedication, but an acceptance and formal opening by the proper authorities or a user."

In *Lightcap's case, supra*, it was held: "To constitute a dedication of land for highway purposes, there must be an offer of the land by the owner, and acceptance of such offer by the public or by the proper local authorities.

"The owner of certain real estate offered to dedicate a part thereof to the public for highway purposes. Before the offer was accepted such owner sold and conveyed the real estate, the deed of conveyance containing no reservation of the part so offered to the public: *Held*, that the conveyance constituted a revocation of the offer to dedicate."

And in *Schmidt v. San Francisco, supra*: "Where the dedication of a street or part of a street has not been accepted, or the property used by the public, it is purely a question of estoppel *in pais* whether it can be revoked or not. If no one has acted upon the offer in such a mode as to be injured by the revocation the owner may revoke the dedication, even though it be an actual dedication, and not a mere offer.

"Where a *cul de sac* has been marked upon a recorded map of a tract surveyed into streets, blocks, and lots, and such *cul de sac* was established in a block which was entirely unimproved, the owner of the tract had a right to revoke the dedication or offer to dedicate the *cul de sac*, and a

conveyance of the entire block accompanying it by a description making no reference to the *cul de sac*, or to any alleged streets, amounts to a revocation if the purchaser had no notice of any fact which would have estopped the grantor from revoking."

A proper application of these principles to the facts presented are in full support of his Honor's ruling that the defendant must comply with his contract of purchase, it appearing that the only individuals who have ever bought or now hold any of the lots have executed a formal deed relinquishing any and all rights in the streets or alleys as indicated in the plat, and, as to the public, that these streets and alleys have none of them ever been opened or used, and not only have the public streets and avenues of the city of Charlotte been extended in entire disregard of the streets and alleys shown on the plat, but the city authorities having charge of the matter under the charter and general laws have made formal renunciation of the public rights concerning them. There is nothing in *Elizabeth City v. Commander*, 176 N. C., 26, that in any way militates with the disposition we make of the present appeal. That case proceeded on the idea that the deed of owner was not a revocation, but was in full recognition of the plat containing his offer of dedication.

We have not been inadvertent to the statute, Laws 1911, ch. 55, providing for the registration of plats of this character. The law was no doubt enacted in view of a decision of this Court in *Sexton v. Elizabeth City*, 169 N. C., 385, in which it was held that a purchaser in reference to a second plat who had registered his deed would take precedence over one under a former plat, but who had failed to have his deed registered; this on the ground that, as no statute provided for registration of plats, the date of registration of the deed would determine the matter. The statute was designed to regulate priorities as between two conflicting dedications, and does not and was not intended to effect the general principles, dedication and acceptance, and the owner's right of revocation which we have held to be controlling on the facts of this record.

There is no error, and the judgment for plaintiffs is

Affirmed.

D. E. ADDERHOLT v. IDA C. LOWMAN ET AL.

(Filed 12 May, 1920.)

1. Tenants in Common—Deeds and Conveyances—Feme Covert—Privy Examination—Statutes—Attorneys in Fact.

Where a conveyance of land is made under a power of attorney sufficient in form by the heirs at law of a deceased owner of land, as tenants in common, but one of them, a *feme covert*, at the time, had not had her privy examination taken under the provisions of Rev., 952, both the power

of attorney and the deed predicated and dependent upon it are ineffective to convey her interest, and she holds as a tenant in common with the purchaser, or those who may have acquired title under his deed.

2. Tenants in Common—Adverse Possession—Sale—Proceeds—Limitation of Action.

As between tenants in common, occupation and sole appropriation of the proceeds of real property by one or more of the tenants will not alone ripen title as against the other cotenants for any period short of twenty years.

3. Tenants in Common— Entry— Possession— Presumptions— Ouster— Deeds and Conveyances.

The distinctive and controlling feature of a tenancy in common is unity of possession, each tenant having a right thereto in the whole and every part of the property, and any one of them entering into possession is presumed to do so in pursuance of their rightful claim for themselves and all of their cotenants, and while there may be circumstances constituting an actual ouster, he may not change the nature of this occupancy by a mere declaration to that effect, or by a deed purporting to convey the whole property.

4. Same—"Color of Title"—Limitation of Actions.

Where a grantee enters into possession of lands under a deed in sufficient form from one having power of attorney from tenants in common therein to make the conveyance, except that one of these tenants in common was a married woman whose privy examination had not been taken, her deed is not such ouster as will put in motion the statute of limitation, for it will not break the unity of possession, and the grantee's claim of title by seven years adverse possession under color of his deed is defective, not from the lack of "color," but from the character of his possession. The rule applying where allotment has been made in the lands to tenants in common under a judgment decreeing a sale for division, etc., distinguished.

CIVIL ACTION to remove a cloud on title, heard and determined on case agreed before *Harding, J.*, at November Term, 1919, of CALDWELL.

From the facts presented, it appears that the land in controversy was owned by James Corpening, deceased, and that, in 1898, his five children and heirs at law executed a power of attorney to C. A. Little as attorney in fact, authorizing said Little to sell and convey the property; that on 12 December, 1899, said C. A. Little sold and conveyed the property by deed sufficient in form to pass the fee-simple title to one W. D. Joblin, and the ownership and title so conveyed has been acquired, and is now held by plaintiff, and that plaintiff and those under whom he claims have been in continuous possession of the property, claiming to own the same, from the date of said deed to Joblin in December, 1899; that the power of attorney referred to was in all respects sufficient in form to authorize a conveyance of said property, and was duly executed by the children and heirs at law of James Corpening, deceased, save and except that one of said children, Bettie Sudderth, was at the time *feme covert;*

her privy examination was never taken as to the due execution of the instrument; that said Bettie Sudderth became discovert by the death of her husband, C. M. Sudderth, on 30 May, 1912, and she herself died in January, 1916, leaving defendants as her heirs at law, and who claim as such the ownership of her one-fifth interest in the property, except three-fiftieth of the same, the holders of which failed to make answer. On these facts the question at issue between the parties, as presented in the case agreed and in the argument, is whether the title to Bettie Sudderth's interest in the property had matured in plaintiff by more than seven years occupation under said deeds and power of attorney, claiming ownership, or whether an occupation of 20 years is required, occupation for this length of time not being shown.

There was judgment for defendant, and plaintiff excepted and appealed.

Mark Squires for plaintiff.
Spainhour & Mull for defendant.

HOKE, J. The power of attorney upon which plaintiff chiefly rests his claim, in so far as it purports to affect the estate or interest of a *feme covert,* comes directly under the statute, Rev., 952, requiring that her privy examination be taken, and it appearing that, at the time of its execution, Bettie Sudderth, one of the children of James Corpening, deceased, and, as such, owning one-fifth interest in the property, was a married woman, and that her privy examination has never been taken, by the express provisions of the statute and various decisions construing the same, both power of attorney and the deeds predicated and dependent upon it are ineffective to convey her interest, the result being that Bettie Sudderth, and those claiming under her, are tenants in common with plaintiff, who holds the other four-fifths interest which passed by the deed to W. D. Joblin. *Jackson v. Beard,* 162 N. C., 105; *Moore v. Johnson,* 162 N. C., 266.

This being the status of the title, as shown by the deeds affecting the question, it is the recognized principle that, "as between tenants in common, occupation and sole appropriation of the proceeds of real property by one or more of the tenants will not ripen title as against the other cotenants; without more, for any period short of 20 years." And it is uniformly held in this jurisdiction that the deed of one or more of them, purporting to convey the whole, will not of itself affect the position. *Boggan v. Somers,* 152 N. C., 390; *Clary v. Hatton,* 152 N. C., 107; *Dobbins v. Dobbins,* 141 N. C., 210; *Ward v. Farmer,* 92 N. C., 93; *Caldwell v. Neely,* 81 N. C., 114; *Covington v. Stewart,* 77 N. C., 148; *Cloud v. Webb,* 14 N. C., 317.

In *Caldwell v. Neely, supra,* the principle apposite, as it prevails with us, is stated as follows: "The ouster of one tenant in common will not

be presumed from an exclusive use of the common property and appropriation of its profits to himself for any period short of 20 years, and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract." True, we have held that the deed of a married woman, void for want of her privy examination, may suffice as color of title, *Norwood v. Totten,* 166 N. C., 648, but the defect in plaintiff's claim of entire ownership does not arise from lack of color, but from the character of his possession. The distinctive and controlling feature of a tenancy in common is unity of possession, each one having a right to possession in the whole and every part of the property. Plaintiff, being a tenant in common with defendants when he and those under whom he claims entered and occupied, they are presumed to have done so in pursuance of their rightful claim, for themselves and all of their cotenants, and while there may be circumstances constituting an actual ouster, they cannot, in this jurisdiction, change the nature of this occupancy by a mere declaration to that effect, nor by a deed from one purporting to convey the whole. In *Cloud v. Webb,* 14 N. C., 317, a case notable for the very able and learned discussion of the subject by the elder Winston, the position as it prevails with us is stated as follows: "Where four sisters were seized of a tract of land in coparcenary, and three of them, who were sole and of full age, conveyed their shares in fee, and the fourth, who was covert and an infant, joined with her husband in a deed conveying to the same vendee all their interest in the land, to which the *feme* was not privately examined, and the vendee remained in possession of the whole tract, and enjoyed all the rents and profits, without claim or demand, forty years, to the husband's death, and fifteen years after his death it was held that admitting the deed of the *feme covert* to be the color of title, the vendee and the *feme covert* were tenants in common, and that his possession was not adverse to her." And, in our opinion, the ruling is decisive for the defendants on the facts presented.

It may be well to note that the position is modified or a different rule obtains where, in proceedings for partitions, there is judgment purporting to allot to the tenants their respective shares, or where by judicial decree a sale is had for division and deed made purporting to convey to a purchaser the property in severalty; in such case, it is held that an entry and occupation for 7 years, in the assertion of ownership, will ripen the title. *Lumber Co. v. Cedar Works,* 165 N. C., 83; *Amis v. Stevens,* 111 N. C., 172, but such an effect is not allowed with us to a deed inter parties, in which case, as we have seen, an occupation for 20 years is required.

There is no error, and the judgment for defendant is

Affirmed.

TOWN OF MORGANTON v. MRS. SALLIE AVERY.

(Filed 12 May, 1920.)

Liens—Municipal Corporations—Cities and Towns—Sidewalks—Paving—Statutes—Limitation of Actions.

The lien given a city or town on the lots of an owner along its streets for paving its sidewalk, rests only by statute, Rev., 395, subsec. 2, and not by common law, and is enforcible only against the lots, *in rem*, and not against the owner individually or out of his other property, and to enforce the same action must be commenced within three years next after the completion of the work, or it will be barred by the statute of limitations.

CIVIL ACTION, heard at December Term, 1919, of BURKE, before *Harding, J.*, who by consent found the facts and dismissed the action. Plaintiff appealed.

S. J. Ervin for plaintiff.
Avery & Ervin for defendant.

BROWN, J. This is an action commenced on 1 February, 1917, to enforce a tax assessment or charge for paving certain sidewalks abutting on the lot of land of the defendant, under Private Laws 1885, ch. 61, and subsequent amendatory statutes.

The plaintiff claimed a lien on said lot for one-half the cost of such paving, amounting to $87.51, with interest thereon from 28 June, 1911, when said paving was done and completed.

The defendant pleaded that the cause of action of plaintiff was for a liability created by statute, and was barred by the statute of limitations, Rev., subsec. 2 of sec. 395.

It is admitted that the work was completed in June, 1911, more than 5 years before the bringing of this action. The statute provides that within 3 years shall be brought "An action upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it."

We are of opinion that the action is barred. The assessment is not a personal liability of the defendant, and could not be collected out of her personalty by execution. It is a liability created solely by statute, and does not arise *ex contractu*. It is not a personal liability of the owner of the land to be collected by execution, it is a statutory charge upon the land itself, and must be collected by proceedings *in rem* in a court having equitable jurisdiction unless some other legal method is provided by the statute. If the land benefitted is insufficient in value to pay the assessment in full, the remainder cannot be collected out of the other estate of the landowner. *Canal Co. v. Whitley*, 172 N. C., 102; *Comrs. v. Sparks, post*, 581; *Raleigh v. Peace*, 110 N. C., 33.

Without the creative force of the statute, the charge upon the land could not be made. If the statute was repealed the power to create the charge could be gone.

In *Kerwin v. Neevin,* 111 Ky., 682, it is held: "A statute providing that an action upon a liability created by statute when no other time is fixed by the statute creating the liability shall be commenced within five years next after the cause of action accrued, applies to an action to enforce a lien for the cost of a street improvement made when the statute was in force; and, more than five years having elapsed between the time the lien was perfected by the acceptance of the work by the council and the time the action was instituted, the action was barred." *Bristol v. Washington Co.,* 177 U. S., 144.

We are of opinion that the two cases relied upon by the plaintiff do not support the contention that a street assessment is not a liability created by statute. The case of *Shackelford v. Staton,* 117 N. C., 73, was an action for damages against the clerk of the Superior Court of Edgecombe County for a tort, a dereliction of duty, in failing to index a docketed judgment as required by law. The Court held the action was barred within three years after the defendant ceased to be clerk, saying, "We are of opinion that sec. 155, subsec. 2, is the statute applicable to the facts in this case for this action is founded upon a liability created by statute, and there is no other time mentioned in it fixing a bar to a cause of action accruing under it." The other case, *Newsome v. Harrell,* 168 N. C., 295, was an action to recover owelty in partition proceedings. This is a sum directed to be paid to make the partition among cotenants equal, and is called owelty. The power to adjudge owelty has been from time immemorial a power exercised by the courts to adjust the equities arising out of the relation of the parties to the property to be divided.

It was not a creature of the statute, but the lien was declared on the more valuable dividend of the property partitioned by the courts of equity to avoid the injustice of taking from one and giving to another without "an equivalent or a sufficient security for it."

The subject is fully treated in ch. 32 of Freeman on Cotenancy. A ten-years statute bars the right to recover owelty charged by decree upon land in partition proceedings.

The declaration of a lien in partition proceedings is in pursuance of the power conferred upon our Court under its common-law jurisdiction, and bears no sort of analogy to the action of the Court in declaring a lien for a liability *expressly created* by statute. Cyc., vol. 30, p. 171.

Affirmed.

W. H. NORTON v. J. A. SMITH.

(Filed 12 May, 1920.)

1. **Deeds and Conveyances—Statute of Frauds—Descriptions—Parol Evidence—Specific Performance—Equity—Statutes.**

A written contract to convey the grantor's "entire tract or boundary of land, consisting of 146 acres," sufficiently describes the lands intended to be conveyed to admit of parol evidence tending to show that the owner had only one tract of land of that description in that locality, which was generally known, and upon which he resided, and which he cultivated, to designate the subject-matter of the contract and fit it to the description contained in the instrument, and the contract is sufficient to enforce specific performance by the seller under the statute of frauds, Rev., 976.

2. **Deeds and Conveyances— Wills— Contracts— Ambiguity— Statute of Frauds—Parol Evidence.**

The description of land contained in a will which is sufficiently definite to admit of parol evidence to fit thereto the land intended to be conveyed, is also sufficient, in a deed or other written contract; and where there is a description therein of the lands intended to be conveyed, as a certain tract containing a certain acreage, it will not be presumed that the grantor or devisor had more than one tract of that description, and there is no patent ambiguity in the written instrument; and if it is shown that he did have more than one, it is an instance of latent ambiguity, which may be explained by parol evidence to identify the tract intended to be described.

CIVIL ACTION, tried before *Long, J.*, and a jury, at September Term, 1919, of ALEXANDER.

Plaintiff brought this action to recover damages for the breach of a contract for the sale of land. The defense was that the description of the land was too uncertain and indefinite, and the contract is, therefore, void. The land was described as follows: "Whereas, J. A. Smith has sold to W. H. Norton his entire tract or boundary of land consisting of 146 acres on the following conditions, . . . payments to be secured by notes and mortgage on said land, with interest from date of transfer. Said Norton is to pay to said Smith $12,000 sum total in all, $200 cash in hand on the above amount, the receipt of which is hereby acknowledged, $4,800 to be paid when deed is made and delivered, not later than 10 October, 1918, balance in payments of $2,000 on 1 January of each year, commencing 1 January, 1920, till last payment, which would be $1,000, 1 January, 1923. Said J. A. Smith is to have all the cultivated crops this year. Smith is to have dwelling till he gets his tobacco crop worked off, which will be about 1 January, or as soon thereafter as possible."

The jury returned the following verdict:

"1. Did the defendant make the written agreement with the plaintiff to sell his entire tract or boundary of land containing 146 acres to the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant afterwards refuse to convey the said land to the plaintiff, as alleged? Answer: 'Yes.'

"3. What damage, if any, is the plaintiff entitled to recover? Answer: '$1,340.'"

Judgment on the verdict, and the defendant appealed.

W. A. Self, John Gwaltney, James Alexander, and H. P. Grier for plaintiff.

J. H. Burke, F. A. Linney, and L. C. Caldwell for defendant.

WALKER, J., after stating the case as above: There was evidence tending to show that the defendant owned but one tract of land, and had listed for taxation only one tract, which was the land occupied by him as a home; that it contained exactly one hundred and forty-six acres; that he had lived there 10 or 11 years; the land is about one mile from Stony Point, where the contract was made; it has his dwelling on it, and defendant raised tobacco there. It appears to be a well known place, and the only one the defendant owned. It is admitted in the answer that the defendant refused to convey any land to the plaintiff. Defendant alleged in his answer that the contract is void, because the description is not a sufficient compliance with the statute of frauds (Rev., 976), which is specially pleaded in bar of the right to recover. Upon this plea, the judge charged correctly as to the law, and the jury has found against him as to the facts. The description is sufficient for the admission of parol evidence to identify the land, or to fit it to the land intended to be sold and conveyed. The contract described it as the defendant's "entire tract or boundary of land," and further as "consisting of 146 acres." It was not a part of another tract, but was a separate and distinct tract. It was the same as if J. A. Smith had described it as "his 146-acre tract of land." It also appears by the evidence to be the tract he was cultivating in tobacco that year, and to have had more than one dwelling. But the fact that he owned only one tract, and that it contained 146 acres, was sufficient to identify it as the land the defendant contracted to convey. *Carson v. Ray*, 52 N. C., 609, is exactly in point. There the description was "my house and lot in the town of Jefferson," and it was held that it would "undoubtedly" be sufficient, if in a will, to pass the testator's house and lot, in the absence of any proof to show that he had more than one. If, then, such a description would be sufficiently certain in a will, we cannot

perceive any reason why it should not be so in a deed, as, in both instruments, the only requisite, as to the certainty of the thing described, is that there shall be no patent ambiguity in the description by which it is designated. A house and lot, or one house and lot in a particular town, would not do, because too indefinite on the face of the instrument itself. See *Plummer v. Owens,* 45 N. C., 254; *Murdock v. Anderson,* 57 N. C., 77. But "my house and lot" imports a particular house and lot, rendered certain by the description that it is one which belongs to me, and, upon the face of the instrument, is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good. Where the deed or will does not itself show that the grantor or devisor had more than one house and lot, it will not be presumed that he had more than one, so that there is no patent ambiguity, and if it be shown that he has more than one, it must be by extrinsic proof, and the case will then be one of a latent ambiguity, which may be explained by similar proof. An agreement "to furnish water out of the mill dam sufficient to carry the fulling mill and carding machine" was held, in *Fish v. Hubbard,* 21 Wendell (N. Y.), 651, to be a sufficient memorandum to defeat a plea of the statute, and to let in parol evidence to identify the property, *Judge Cowan* remarking: "If it were in proof that the donor or grantor owned one mill dam, one carding machine, and one fulling mill, and no other property of that description at the date of his will or deed, ought we to hesitate in saying that he intended to pass such property; or should we say that possibly he intended some property of his neighbor or neighbors answering a similar description? The presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate, which he does not own." In the subsequent case of *Mead v. Parker,* 115 Mass., 413, where the writing was in these words: "This is to certify that I, Jonas Parker, have sold to Franklin Parker a house on Church Street for the sum of $5,500," the Court held that evidence was competent to show what house the defendant owned on Church Street, if he had only one, and decreed specific performance of the contract, remarking as follows: "The most specific and precise description of the property intended requires some proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written

contract or memorandum of their agreement." So it has been held that a description of land, as that on which a certain person resides, is sufficient to identify it by parol evidence. *Morrisey v. Love,* 26 N. C., 38; *Simmons v. Spruill,* 56 N. C., 9; or by its name, as the "home place," the "Lynn place," or the "Leonard Greeson place." *Smith v. Low,* 24 N. C., 457. These positions are fully sustained by *Lewis v. Murray,* 177 N. C., 17, at pp. 19-21, citing *Bateman v. Hopkins,* 157 N. C., 470; *Thornburg v. Masten,* 88 N. C., 293; *Farmer v. Batts,* 83 N. C., 387, and other cases. Every valid contract must contain a description of the subject-matter; but it is not necessary it should be so described as to admit of no doubt what it is, for the identity of the actual thing and the thing described may be shown by extrinsic evidence. Fry on Specific Performance, sec. 209; Pomeroy on Contracts, sec. 90 and note; *Buckhorn L. & T. Co. v. Yarbrough, ante,* 335. We have not the slightest doubt that this description is not a patent ambiguity, but, at most, is a latent one, susceptible of being made certain by extrinsic proof. It is far more accurate than some of the descriptions held by the authorities to be sufficiently definite, as against a plea of the statute of frauds, to admit parol evidence for the purpose of fitting the description to the land intended to be conveyed.

The other exceptions, as to evidence, etc., are, in the view taken of the case, immaterial, and if the rulings were erroneous, they were harmless. The uncontradicted facts clearly identify the land. The defendant offered no evidence to show that he owned any other "entire tract or boundary of land" containing 146 acres, or that he did not intend to sell his home place.

No error.

W. P. McALISTER v. AMERICAN RAILWAY EXPRESS COMPANY AND THE SOUTHERN EXPRESS COMPANY.

(Filed 19 May, 1920.)

1. Corporations— Absorption— Consolidation— Merger— Continuance in Business—Assets—Debts and Liabilities.

The principle that a corporation taking over another by reorganization, consolidation, amalgamation, or union is subject to the debts and liabilities of such corporation, rests upon the ground that the corporation so taken over either has not been paid a consideration, or that the transaction was in fraud of its creditors, or upon the presumption of a trust for creditors and does not apply when it *bona fide* and fairly sells only a part of its assets or property to the other corporation and continues to exist and to exercise its functions under its franchise.

2. Same—Sale of Assets—Solvency—Express Companies—American Express Companies—Government Control—Fraud—Principal and Agent—Process—Service.

An express company conveyed its property, used in transportation, for its appraised value, to the American Express Company formed at the suggestion of the Director General of Railways, etc., under Government control, retaining property of very large value, so that it remained perfectly solvent, and continued to do business under its franchise, and having its own officials and shareholders distinct from those of the new corporation: *Held*, there was therein no such reorganization, reincorporation, merger, or element of fraud or trust as would make the American Express Company liable for the negligence, torts or obligations of the company, whose property it had thus acquired, nor is the case affected by the provisions of the Revisal, sec. 440, requiring foreign corporations to keep a process agent in this State.

3. Corporations—Sale of Franchise—Extinction—Debts and Liabilities.

A merger or consolidation of one corporation with another, so as to render the latter liable for the debts and obligations of the former, without special contract, implies an extinction of the old corporation, and does not apply when it remains solvent and continues to be an actively going concern, under its franchise, and especially when retaining a part of its property of great value.

4. Corporations—Sale of Franchise—Statutes—Power to Construct and Operate.

The franchise of a corporation "to be such" is entirely distinct from its franchise to transact its business. In this case, the Southern Express company retained its franchise "to be" and "to operate," and also a large part of its property and assets, and the doctrine of merger, or consolidation, does not apply.

CIVIL ACTION, tried before *Calvert, J.*, and a jury, at December Term, 1919, of ROBESON.

Plaintiff shipped by the Southern Express Company a package of paint from Lumberton to Hendersonville, in this State, to his own order, and paid the freight charges thereon. The paint was shipped on 22 March, 1918, and not being delivered, on 2 May, 1918, he filed a written claim with the Southern Express Company for the negligent failure to transport and deliver the same, claiming damages in the sum of $16 for the paint and freight paid, and $50 for the penalty. The Southern Express Company was not served with process, and no judgment was entered against it. The court submitted issues to the jury, which, with the answers thereto, are as follows:

"1. In what sum, if any, is the defendant, Southern Express Company, indebted to the plaintiff on account of the loss of merchandise, as alleged in the complaint? Answer: '$16, with interest from 5 May, 1918.'

"2. In what sum, if any, is the defendant, American Railway Express Company, indebted to the plaintiff on account of loss of merchandise, as alleged in the complaint? Answer: '$16, with interest from 5 May, 1918.'

"3. Did the plaintiff file claim in writing with the agent of the defendant, Southern Express Company, within the time provided by law for the sum of $16. Answer: 'Yes; claim filed 5 May, 1918.'

"4. Did the defendants, or either of them, pay said claim within three months after the filing of the same, as provided by statute? Answer: 'No.'

"5. In what sum is the defendant, Southern Express Company, indebted to the plaintiff on account of the penalty for failure to pay said claim within the time provided by law? Answer: '$50, and interest from 1 January, 1919.'

"6. In what sum is the American Railway Express Company indebted to the plaintiff on account of failure to pay said claim within the time provided by law? Answer: '$50, and interest from 1 January, 1918.'

"7. Does the defendant, Southern Express Company, maintain a process agent, or own any property within the State of North Carolina? Answer: 'No; not since 30 June, 1918.' "

The plaintiff introduced evidence as to his claim, and rested.

The defendant introduced an agreed statement of the facts in the case as follows: Stipulation of facts as to the transfer of property, Southern Express Company to American Railway Express Company:

1. The Southern Express Company is a corporation organized under the laws of the State of Georgia, and conducted the principal express business in the Southeastern States for a long number of years.

2. When the railroads were taken over by the United States Government, under proclamation of the President dated 26 December, 1917, the Southern Express Company and other express companies doing business in the United States, had no contracts under which they might operate. It was stated to them by the Director General of Railroads that if they would transfer to a new company their properties used in the express transportation business the Director General would make a contract with that new company to conduct the express transportation business of the company, or rather roads under Government control.

3. An agreement was reached and the tangible properties used by the Southern Express Company and the Adams Express Company, the American Express Company and the Wells & Fargo Company's express were transferred to the American Railway Express Company, effective 1 July, 1918.

4. The American Railway Express Company was incorporated under the laws of the State of Delaware, with an authorized capital stock of

$40,000,000, with an actual capital stock of $33,000,000; $30,000,000 of this actual capital stock was paid in by the transfer of the tangible property of the above mentioned old express companies, upon the basis of the cost of those properties, less their depreciation. The old companies did not transfer money, notes, and accounts, nor did they transfer any property not used in the express transportation, which means that they did not transfer any of the assets used in the conduct of any other business than a transportation business. They did not convey any of their investments, such as stocks, bonds, notes and accounts, or real estate or other personal property not used in transportation business.

5. No one of the old companies ceased to have corporate life. Each of the old companies continued to own a part of the properties which it had previously owned, consisting of moneys, notes and accounts, and other property not used in the express transportation business, and in addition thereto those companies owned the stock of the American Railway Express Company which they had acquired by the transfer of their properties, which amounted in the aggregate for the several companies to $30,000,000, and they owned $3,000,000 more of that stock which they paid for in cash in order to furnish the new company with working capital.

6. The Southern Express Company acquired about $1,600,000 of the stock of the American Railway Express Company in the manner above stated.

7. The Southern Express Company continued to own and now owns certain real estate, stocks, and bonds not included in the property transferred to the American Railway Express Company. The American Railway Express Company did not assume the debts of any of the old companies, including the Southern Express Company. The Southern Express Company is continuing its corporate existence with a president, treasurer, a claim department, counsel, and board of directors. Its business is being conducted at 51 Broad Street, New York.

The defendant rested; the plaintiff was then permitted to offer the following evidence:

R. E. Lewis, being duly sworn, testified: I am sheriff of Robeson County, and since 1 July, 1918, I had an execution in my hands issued against the Southern Express Company, and was unable to find any property belonging to this company in my county.

By consent of the defendant, the plaintiff offered a telegram from the Corporation Commission, stating that it was advised by the general counsel for the Southern Express Company that said express company had no property within the State of North Carolina since 30 June, 1918.

The defendant in due time, and proper manner, moved to nonsuit, and the motion was denied.

Judgment was entered upon the verdict, and defendant, American Railway Express Company, appealed.

Johnson & Johnson for plaintiff.
McLean, Varser, McLean & Stacy and R. C. Alston for defendant.

Walker, J., after stating the facts as above: We cannot bring our minds to the conclusion that the defendant is liable for the debts of the Southern Express Company upon the material facts of this case. The cases which hold that a new corporation must pay the debts of the original one are those where there was a reorganization, consolidation, amalgamation, or union, and the new company is subjected to liability for the debts and torts of the old company upon the ground of an implied *assumpsit,* or of fraud, or under the trust fund doctrine, or because, by reason of the facts and circumstances, the complete absorption of the old company and its assets, including its franchise, being the leading and controlling one, it is completely substituted in its place, and thereby becomes the debtor to its creditors. It would be manifestly unfair, unjust, and contrary to equity that it should thus acquire all of the assets of the other corporation, and its franchise, both to be, and to do, leaving no one to be sued by its creditors and no property to satisfy its debts and other liabilities, and not itself become responsible for such debts and other liabilities. If it takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it. But this case bears no resemblance to the ones just stated. There has been no reincorporation, reorganization, consolidation, merger, or anything else done. The Southern Express Company is still a live and going concern. It is exercising both its franchise to be, and to operate, and to conduct its business, and it is not even insolvent, but has enormous assets apart from the property assigned, for commensurate and adequate value, to the Delaware corporation, which is the defendant here. It is contended that the Southern Express Company has had no process agent in the State since 30 June, 1918, which means nothing more than this, that the said company retired from the express transportation business, having sold its property used in that department to the defendant for the consideration of so much stock of that company of equal value, and that therefore it required no officer or agent to transact that kind of business, upon whom process could be served under Revisal, sec. 440, as it no longer required the employment of such officer and agent in this State, and it does not refer to a person who acts in its behalf only for the purpose of receiving the service of process, as

in the case of some other corporations. It never had any such agent. It may here be said that the Southern Express Company has ample assets to pay the claim of the plaintiff, and he may still resort to them for its satisfaction. We have so far principally discussed the facts of the case. We will now turn to the law, and refer to a few well settled principles, and apply these facts to them. It has been held, for instance, that the rule, which applies when there is a merger or consolidation, so that the original company becomes extinct, has no application when there is merely a sale of property by one corporation to another, no more than it would apply when there is a sale to an individual. "It seems that the foregoing rule is not applicable to a *bona fide* sale by one corporation to another of all of its property for a good consideration, but that in such a case the purchasing corporation would hold the assets discharged of any obligations towards the creditors of the selling corporation." 10 Cyc., 308.

"Where there has been neither a consolidation nor a merger, but a mere sale, by one corporation of its property to another, that sale, if permitted by the Constitution and the laws as not being against public policy, or otherwise illegal, and if made for a valuable consideration and in good faith will pass the property of the selling corporation to the purchasing corporation free from claims of mere simple contract creditors. In every such case the same rule obtains as obtained in the sale of an individual to another individual." *Vicksburg, etc., Tel. Co. v. Citizens Tel. Co.,* Miss., 231.

"If one corporation purchases the property of another, it is not liable to the other's creditors for its debts." *Kentucky Dist. & Warehouse Company v. Webb, Executor,* 203 S. W., 870.

"As a general rule, the mere purchase of the assets and franchise of one corporation by another will not imply a promise on the part of the new to pay or satisfy the debts and obligations of the old." 5 Thompson on Corporation (2 ed.), sec. 6090.

"A *bona fide* purchaser of the assets of a corporation is not, nor is the property conveyed, liable for its debts, except such as are contracted or incurred in the operation, use, or enjoyment of its franchise, in the absence of agreement to that effect, unless the purchaser is a reorganization of the vendor, or unless by merger or otherwise, the one is a continuation of the other." *Moore v. Boise L. & O. Co.,* 173 Pac. Reps., 117.

It is held in *Evans v. Unity Investment Co.,* 196 S. W. Rep., 49, that where there is no intent to defraud creditors, "The mere transfer of the assets of a corporation, even in a failing condition, to another corporation, does not, *ipso facto,* render the latter liable for the former's debts.

The transfer was not made without consideration to the old company; neither was it made in order to defraud its creditors, but in order that they might be paid."

"Where one corporation conveys its property to another, this alone does not destroy the corporate existence of the grantor or constitute a merger of the two corporations." *L. & N. Railroad Co. v. Hughes,* 134 Ga., 75.

"When a new corporation, with different stockholders, is formed, it cannot be sued by the creditors or be liable for the debts of the old corporation except upon some special ground, such as having received the assets of the old corporation without giving value therefor." *Donally v. Herndon,* 41 Va., 519.

There has been no merger, or consolidation, of the Southern Express Company by the defendant, as they both imply an extinction of the old corporation, which is not the fact in this case, as the former is much alive, and an actively going concern, with its franchise and a large part, if not the largest part, of its property retained. The defendant's stockholders are altogether different from those of the Southern Express Company, they being the four express companies, while the stockholders of the others are individuals, none of the stockholders of the four companies being a stockholder in the defendant company. So that the formation of the American Railway Express Company lacks certain elements which are essential in order to charge it with the antecedent debts or torts of the other companies. We may as well, at this point, advert to the object contemplated and to be attained in the formation of the American Railway Express Company. The United States Government had taken possession of the railroads of this country for the purpose of more effectively prosecuting the war against Germany and her allies. At the time this was done, the express companies had contracts with the railroad companies for the transportation of goods over their lines in the general conduct of the express business. These contracts were virtually annulled by the action of the Government in respect to the railroads, and in order to restore this traffic, negotiations between the two parties, the express companies and the Government, were entered upon for this purpose. It was suggested by Mr. McAdoo, Director-General of Railroads, that for convenience in the transaction of the express transportation business, it would be best to form a new corporation, to which the express companies should convey all their property used in their transportation business, and each of them receive, in consideration thereof, so much of the stock of the new company as would be equal, at its par value, to the value of the property sold by it to the said company. This suggestion was at once accepted and carried out. The company was incorporated under the laws of Delaware, and

the transfer and issue of stock was made accordingly. The Government wanted to buy the property, as it was exactly suited to its purpose, and in the situation thus confronting them, the express companies were anxious to sell, as they, of course, would otherwise have no use for the property, and, besides, without such an adjustment it would become greatly depreciated in value, as there was no chance of restoring the status *quo ante bellum,* or any hope of replacing the old system with any system of transportation of similar usefulness and efficiency. So both parties being accommodated in their wishes and purposes, the Director General's suggestion was adopted. The great advantage such an arrangement would be to the Government in coping with the immensely increased traffic during the war period, was an additional consideration in bringing about the agreement. There was absolutely no fraudulent purpose, because fraud could not possibly be predicated of such a transaction, but, on the contrary, it was based upon a good and valuable consideration, the stock of the company—presumably being at its par value, and it was underlaid with the highest and most patriotic motive to better prepare the Government for meeting and overcoming its adversaries. So that this takes from the arrangement every element which would expose it to successful attack. It was nothing but a sale of part of its property by each of the four express companies. There was no semblance of merger, consolidation, reincorporation, or anything else, which required the surrender of its franchise, on the part of any one of the express companies, and its extinction as a corporation. The Southern Express Company did not, and could not, act in dual capacities, that is, sell its franchises, and, at the same time, retain them, nor could it maintain its separate corporate existence, as a going concern, and, at the same time, part with it, by becoming merged or consolidated with the other companies into the defendant company. The two positions are inconsistent with each other, as a merger or consolidation presupposes the surrender of its franchise, or right to be, and not that it still exists and continues to operate, as it does upon the facts before us. There has been, therefore, as we have before said, no merger or consolidation, but simply a sale of property, which carries with it no liability for the debts of the seller. In this case, the defendant is not the owner of the franchise of the Southern Express Company, but has merely purchased some of its property, which it is now using in its business, not under the franchise of the old company, but under its own, as a corporation of Delaware, organized under a charter granted by that State to it. This is illustrated by the case of *Seaboard Air Line Ry. Co. v. Leader et al.,* 115 Ga., 702, where it was held that in order to render a railroad company liable on the contracts or for torts committed by its predecessor in title, it must appear that it had assumed

the liability of its predecessor, or that the law charged it with such liability. The Court further held that, under Civ. Code, sec. 1863, of Georgia, providing that any corporation in the State operating the franchise of another corporation is subject to its burdens, and can be sued when and where and for like causes for which suits could have been maintained against such other corporation, were it in possession of the franchise so acquired, there is nothing which renders a corporation purchasing the line of railway of another corporation liable either on its contracts or for its torts. That a railway company is operating a railway which formerly belonged to another company does not render the company so in possession liable for damages growing out of a breach of contract, which had been entered into by the other company. It will be seen, therefore, that the defendant was acquitted in that case of any liability, even under the statute mentioned, which is very broadly worded, and upon the ground that there was no surrender of its charter, but only a simple sale of its property. That case is a direct authority for the defendant's position that there is no liability here. The facts of the two cases are substantially the same, as the plaintiff sued in the Georgia case for the loss of goods valued at $29.50. He was successful in the justice's court and in the Superior court, the judgment being reversed in the Supreme Court, and for the reason that the transaction was a sale of the Georgia & Alabama Railway, but not of its franchise, to the Seaboard Air Line Railway Company. The Court said in concluding: "Nothing in that decision (*Ala., etc., Railroad Company v. Fulghum,* 87 Ga., 263), or in the section of the Code construed in the light of that decision, would render a railroad company, which purchased the line of another company, liable for the breach of a contract of its predecessor in title, or for damages growing out of a tort committed by it, in the absence of an agreement on its part to pay such claims against its predecessor in title." A simple perusal of the opinion in the *Leader case* will reveal how closely the facts of that case and this one are allied, and if there is any difference, it is entirely favorable to the defendant in this case. The distinction between a merger and a sale is clearly shown in *Atlanta, etc., Railroad Company v. A. C. L. Railroad Company,* 138 Ga., 353, and there a merger or consolidation is thus defined: "Where two corporations effect a consolidation (or merger), *and one of them goes entirely out of existence,* and no arrangements are made respecting its liabilities, the resulting consolidated (or merger) corporation will, as a general rule, be entitled to all the property and answerable for all the liabilities of the corporation thus absorbed." But, says the Court in that case, where a railroad company sells its property, the buyer is not responsible for more than the purchase money, p. 357. To the same effect is the case of *Pennison*

v. Chicago, etc., Ry. Co., 93 Wis., 344, where it was held: In an action against a railroad company a complaint alleging that defendant "purchased and had assigned to itself the railroad, franchises, immunities, stocks, bonds, and all property and appurtenances" of another company, shows merely a succession, and not a consolidation such as would render defendant responsible for a tort previously committed by its vendor. A railroad company's franchise to be a corporation is entirely distinct from its franchises to construct and operate its road, and is not the subject of sale or transfer unless by virtue of some positive statutory provision. The Court, in the course of its opinion, said: cases cited declaring and illustrating the effect of consolidation in respect to the debts and liabilities of the companies of which the consolidated company is composed are not material to the present inquiry. The complaint shows simply that what is called in some of the books a "succession" has taken place, and that the property of a corporation has been purchased at a private sale, which differs from a consolidation in this respect, that the purchaser thus acquiring the property and franchises of the selling corporation does not become responsible for its liabilities already accrued. This is quite well settled, and we have not been referred to any well considered case to the contrary, citing for this position Taylor on Private Corporations, sec. 415; *Wright v. R. R. Co.*, 25 Wis., 46, and other cases. Referring to the *Wright case, supra,* it said: "The allegations relied on to charge the defendant company were, in substance, the same as in the present case, and extended there, as here, to a sale of the franchises; but it was held that this averment should be interpreted as extending only to the franchise of operating the road sold, and *Paine, J.,* states tersely that 'the distinction between the franchise of constructing and operating a railroad, and the franchise of being a corporation and of contracting, suing, and being sued as such, is well established,' and that upon such allegations it was only the former that passed to the purchaser. In the absence of any contract or of a statute imposing the liability contended for, it does not exist." The law with reference to the liability of one corporation for the debts and torts of another, when there has been merger or consolidation, under a purchase of its franchise of both kinds, and also its property or assets, and its nonliability for such debts and torts when there is only a sale, is fully considered and the authorities cited, in a note to *Atlantic & B. R. R. Co. v. Johnson,* 11 L. R. A. (N. S.), 1119. "Where a corporation transfers all its assets to another corporation and does not agree to assume the liability of the selling corporation, and both corporations maintain a separate existence, then in the absence of fraud the purchasing corporation will not be answerable for any debts of the selling corporation." 10 Cyc., 1268. The transfer of some of its property by

the old company did not close its business, nor destroy its identity, or its corporate existence, but it continued to do business under its charter, and there was no fraud in the transaction, it being necessary under the circumstances, to show fraud in order to charge the new company with the payment of the old company's debts and liabilities. *M. Nat. Bank v. Claggett,* 141 U. S., 520; *Goldmark v. Magnolia Metal Co.,* 60 N. Y. Suppl., 425.

After this review of the authorities, it will not be useless repetition to restate the fact that the sale, in this case, extended to only a part of the property of the Southern Express Company, and that its primary franchise was not included in the sale.

While we decide with the defendant, we do not agree with its view that the plaintiff is seeking to impose directly upon the defendant the penalty of our statute mentioned in the complaint. It only seeks to recover the penalty, if entitled to it, as a part of the debt, or liability, of the Southern Express Company to him. He could not recover the $50 simply as a penalty imposed on the defendant by the State for its delinquency, because it was not in the possession of the Southern Express Company's property when the penalty accrued, but if defendant were at all indebted to plaintiff, the liability would include the penalty as a part of the sum due the plaintiff from the Southern Express Company.

The court erred in its instructions upon the issues, and in refusing a nonsuit. The opinion will be certified with directions to reverse the judgment and dismiss the action.

Reversed.

R. A. HODGES, ADMINISTRATOR OF MARTHA HODGES, DECEASED, v. VIRGINIA-CAROLINA RAILWAY COMPANY.

(Filed 19 May, 1920.)

1. Pleadings—Demurrer.

A demurrer to a complaint is bad if the allegations therein, taken as true and interpreted in the light most favorable to the plaintiff, tend to establish a good cause of action.

2. Torts—Damages—Misdemeanors—Statutes—Cutting Telephone Wires—Contracts.

The willful cutting of a telephone wire in public use for hire is made a misdemeanor punishable by fine or imprisonment by our statute, Rev., 3845, and where such act has caused damage to another the action sounds in tort, making the tort feasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties.

3. Same—Physicians—Childbirth—Death of Wife—Pleadings—Demurrer.

Upon allegations of the complaint that the plaintiff had made arrangement with a physician to attend his wife at childbirth upon being called upon a public service telephone line connecting his residence with a certain store, from which the call should be made, which would have been accomplished except for the defendant company knowingly, willfully, and unlawfully cutting this line upon its right of way, and that the failure of the attendance of the physician resulted in the death of the plaintiff's wife, which would not otherwise have occurred: *Held*, a demurrer thereto admits the allegations to the effect that the defendant's tort in knowingly, willfully, and unlawfully cutting the wire was the proximate cause of the failure of the physician to be present at the childbirth, and that had he been present, the plaintiff's wife would not have died, and the demurrer should have been overruled.

4. Torts—Physicians—Childbirth—Death of Wife—Damages.

Where the defendant is liable in tort for the failure of the plaintiff to have a physician present at childbirth of his wife, proximately resulting in her death, the measure of damages is the value of the life of the wife to be estimated under the decisions of the Supreme Court, and are not too remote to be recoverable.

CIVIL ACTION, tried before *McElroy, J.*, at Fall Term, 1919, of ASHE.

The defendant demurred to the complaint upon the ground that it did not state a cause of action. The plaintiff administrator of Martha Hodges was her husband. She died during childbirth on 22 March, 1918. The complaint is as follows:

"That prior to 22 March, 1918, and prior to the building and construction of the Virginia-Carolina Railway Company's line of railroad into Ashe County, North Carolina, there was a telephone line running from Tuckerdale, North Carolina, to the offices of Dr. A. L. Jones and Dr. S. E. Pennington, about five miles distant from Tuckerdale, which telephone line had been continuously in use since its construction, and that said line was a public-service line and was operated for hire in the transmission of messages over said line. That when the Virginia-Carolina Railway Company laid off and constructed its line of railroad, the said railroad at three different points passed under said telephone line or over said telephone line, and for some three years or more after said railroad was constructed and in operation, the telephone line remained intact, over the tract and line of the Virginia-Carolina Railway. That during such periods, as before alleged, messages at various times were transmitted over said line, calling for said physicians, to the bedside of various sick persons, to give them medical care and attention, to which calls they responded.

"That three weeks prior to 22 March, 1918, this plaintiff engaged the services of Dr. S. E. Pennington and Dr. A. L. Jones, both of whom were connected with the telephone line mentioned, to be present and

administer to the wife of this plaintiff, Martha Hodges, who was expected to be delivered of a child during the month of March, 1918. That the plaintiff was and is a poor man, with a large family to maintain and support, and was compelled to be away from home working on his job and under contract, in order to maintain and support his family, and that prior to his going away he had made arrangements with some of his neighbors to stay at the home of the plaintiff at nights with his wife and children, in order that there might be some one to be present to call a physician, which he had engaged, when their services should be needed, and that he had also made arrangements with J. E. Tucker or his family to call either Dr. Pennington or Dr. A. L. Jones, when notified that plaintiff's wife needed medical or the attention of a doctor, and that he had also informed Drs. E. S. Pennington and A. L. Jones that he would call or have them called when his wife became confined, or needed their attention. That J. E. Tucker lived at Tuckerdale, and the telephone was in his house, and the plaintiff lived about one-fourth mile from the home of J. E. Tucker at this time.

"That the defendant owned and operated a telephone line on its right of way and along its railroad track, between Abingdon, in Virginia, and Elkland, in Ashe County, N. C., during the year of 1918, and prior thereto, as well as since.

"That on 22 March, 1918, the defendant did knowingly, willfully, and unlawfully and negligently cut the telephone wires of the telephone line between Tuckerdale and the offices of Dr. S. E. Pennington and Dr. A. L. Jones, without notice to the owners of the telephone line, or the persons connected on said line and without license or authority. That on 22 March, 1918, the plaintiff's wife, Martha Hodges, became ill and confined in child labor, and she sent one Mrs. Marcus Combs to the phone office at J. E. Tucker's to phone for either Dr. A. L. Jones or Dr. S. E. Pennington, either one that could be gotten, and request him that a phone message be sent requesting the said doctor or doctors to come at once to the home of this plaintiff, to attend plaintiff's wife. And that plaintiff's wife and intestate sent Marcus Combs to the home of George Stike to go after this plaintiff, the plaintiff having had arrangements that said Stike should come after him on notice. That repeated attempts were made to call Dr. A. L. Jones and Dr. S. E. Pennington, and they could neither be called. Dr. A. L. Jones was at home at this time, and would have come immediately if he could have been called over the phone. That as soon as it was discovered that the said Dr. A. L. Jones could not be called on the phone, a runner was placed on a horse and sent to the home of Dr. Jones, who came as soon as he received the call or information that his services were needed at the home of the plaintiff, but he reached the home of the plaintiff too

late to save the life of plaintiff's wife and intestate. That there was no other physician available who could be called.

"That the reason of the wanton, unlawful, and negligent act on the part of the defendant in cutting the telephone wire and line between Tuckerdale and the offices of Dr. S. E. Pennington and Dr. A. L. Jones, which telephone line the plaintiff had a right to believe, and did believe, would be in ordinary condition, and over which the call for physicians could be made, this plaintiff or his intestate was not able to obtain medical attention, and service for his said wife and intestate at the proper and necessary time to save the life of the plaintiff's wife and intestate, Martha Hodges. That if the said telephone line hereinbefore referred to had not been cut Dr. A. L. Jones could have been reached in time to have arrived at the home of plaintiff in ample time to save the life of plaintiff's intestate. On the account of all of which, the plaintiff has been damaged in the sum of $5,000."

The demurrer was sustained, and the action dismissed. Plaintiff appealed.

C. B. Spicer and G. L. Park for plaintiff.
Bowie & Austin for defendant.

BROWN, J. The grounds of demurrer are:

"(a) It appears from the face of the complaint that the alleged negligence of the defendant was not the proximate cause of the plaintiff's intestate's injury.

"(b) And that it is not alleged in the complaint that the defendant has violated any contractual duty that it owed to the plaintiff's intestate.

"(c) That the damages alleged in the plaintiff's complaint are too remote to sustain an action against the defendant."

We think that the points intended to be presented by the learned counsel for the defendant cannot well be raised by demurrer to this complaint. The allegations are comprehensive and pointed. Upon demurrer those allegations of fact must be accepted as true and interpreted in the light most favorable to the plaintiff. *Smith v. Hartsell,* 150 N. C., 71. The complaint charges that the defendant knowingly and willfully and unlawfully cut the telephone line of a public service company without notice; that this line connected with Drs. Pennington and Jones whom he had engaged to attend his wife in childbirth. That as soon as his wife was taken down he attempted to communicate with the doctors by this public-service phone, and could not do so because it had been wrongfully cut by the defendant without notice to any one. That there was no other physician available who could be obtained. Plaintiff further specifically alleges that these physicians could and

would have come at his call but by reason of the unlawful cutting of the wires of the telephone company, they were unable to reach the plaintiff's wife in time to save her life. Plaintiff further alleges that if the line had not been cut, a physician could have been reached in time to have arrived at the home of the plaintiff to save the life of his wife. The cutting of telephone wires is made a misdemeanor punishable with fine or imprisonment by sec. 3845 of the Revisal. Upon the facts stated in this complaint the defendant and its agents are guilty of a misdemeanor. The plaintiff alleges that this unlawful act was the cause which resulted in his wife's death, and that it was the proximate cause of the same.

It is not necessary that the plaintiff and the defendant should have had any contractual relations. Upon the allegations of the complaint the defendant is guilty of a tort, and as such is liable for any injuries naturally following and flowing from the wrongful act.

In *Drum v. Miller,* 135 N. C., 214, it is said: "It may be stated as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to another . . . he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury, which follows, nor indeed any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct."

It is undeniable if the allegations of the complaint are true, that the failure of the physicians to arrive in time to minister to the wife during childbirth, was the direct result of the unlawful act of the defendant. It is alleged in the complaint that if a physician had arrived in time he could have saved her life. This may be very hard to prove, but it may be that she died from some cause that a physician could have remedied had he been present. We are not called on to pass on this question, for it is distinctly alleged in the complaint that the condition of the wife was such that a physician could in all probability have saved her life. This allegation must be taken to be true upon demurrer. The position that the damages are too remote to sustain an action cannot be maintained. If the jury should find under proper evidence that the failure of the physician to arrive in time was caused by the wrongful act of the defendant in cutting the telephone wires, that would establish the tort. If the jury should further find upon competent and sufficient evidence that the circumstances of the childbirth and the conditions were such that had the physician been present, he could have administered remedies which in all reasonable probability, judging by experience, would have saved the life of the wife, then the unlawful act of the defendant would be the proximate cause of her death. This would

establish a cause of action. The damages would be the value of the life of the wife to be estimated by the jury in accordance with the numerous decisions of this Court.

We think the demurrer should have been overruled, and the defendant allowed to answer.

Error.

W. O. HALL v. F. C. HALL.

(Filed 19 May, 1920.)

1. Libel and Slander, Distinguished.

Libel or written slander is distinguished from oral slander, in that the former is actionable if it tends to render the party of whom it is written, liable to disgrace, ridicule, or contempt, and it need not impute any definite infamous crime.

2. Libel and Slander—Intention—Evidence—Questions for Jury—Damages—Punitive Damages.

A letter written to the married daughter of the plaintiff, in an action for libel, stated "I hate to expose him, as he is my brother and your father, but he is trying to expose me, and I will have a suit for him when he comes over," that he had taken from another a load of fodder from his stack in the darkness of night, and had put it in his wagon and hauled it off; that his half sister had been telling "some ugly tales on him" of his making her sit on his lap, hugging her, and wanting her to hug him; that he had given her some articles of apparel that he should have given his own wife and daughters; that the half sister had said "he had cut a shine over her, and she was afraid of him," etc.: *Held*, sufficient for the determination of the jury of whether the defendant had intended to charge the plaintiff with the crimes of stealing and attempted incest with his half sister, and of malice sufficient upon which punitive damages may be awarded by them in addition to actual or compensatory damages. The charge of the judge in this case is approved.

3. Appeal and Error—Objections and Exceptions—Unanswered Questions.

Upon exception to the ruling out of questions asked a witness upon the trial, it must be shown what the answers were expected to have been, so that the Court may pass upon their relevancy and materiality on appeal, or the exception will not be considered.

APPEAL by defendant from *McElroy, J.*, at the July Term, 1919, of ASHE.

This is an action to recover damages for the publication of a libel of and concerning the plaintiff, contained in a letter written by the defendant to the married daughters of the plaintiff in the following words: "I hate to expose him as he is my brother and your father, but he is trying to expose me, and I will have a suit for him when he comes over,

instead of bringing feed for his cattle when he was in Wilkes he went to a man's stacks in the darkness of the night and got him a load of fodder, put it in his wagon, and hauled it off. I am sorry he had such little judgment as that; and Cora Hall is telling ugly tales on him and says he tried to and made her sit on his lap and hugged her, and wanted her to hug him. When he went back home he bought her a nice sweater and sent her. We think he ought to have bought you girls a sweater apiece or your ma. He was never that free-hearted with his whole sisters, let alone other people. We think he ought to have bought his little grandchildren sweaters and such like, and help you girls with what he had to give Cora Hall, for she had plenty of money and clothes, too. She said he cut such a shine over her she got afraid of him. Of course I reckon he told your ma about it. I hope you will not think hard of me for writing the truth, for I can prove what I have written."

Cora was a half sister of the plaintiff, and was dead at the time of the trial.

The plaintiff in his testimony gave the following account of his getting the fodder:

"I went to Wilkesboro, and was gone three nights, and on my way back I stopped at my brother Felix Hall's store a little after night, don't know exactly the time, and there was snow on the ground; I got out of my wagon, rapped on the door and hallowed, but there was no answer. I wanted to buy some feed, and I went around to Felix Hall's fodder stack, took out two bunches, put it in my wagon, and went to Billings and stayed all night. I did not see F. C. Hall till 27 December, about two months after I got the fodder and stayed all night with him. I told him I took a little of his fodder to feed my cattle."

He also denied taking any liberty with his half sister, Cora.

The defendant admitted the publication of the letter, but denied that he made or intended to make a charge of larceny or of attempted incest, and he alleged that the words written by him were true.

There was a motion for judgment of nonsuit, which was overruled, and defendant excepted.

The other exceptions will be referred to in the opinion.

The jury returned the following verdict:

"1. Did the defendant write and publish of and concerning the plaintiff the language or words in substance as set out in paragraph two of the complaint? Answer: 'Yes.'

"2. Did he mean thereby to charge the plaintiff with larceny? Answer: 'Yes.'

"3. Did he mean thereby to charge the plaintiff with an attempt to commit the crime of incest? Answer: 'Yes.'

"4. Were said words written with malice towards the plaintiff? Answer: 'Yes.'

"5. Were the charges made in the written words contained in paragraph two of the complaint true? Answer: 'No.'

"6. What damage is the plaintiff entitled to recover of the defendant? Answer: '$1,000.' "

Judgment for the plaintiff, and defendant appealed.

R. A. Doughton and Bowie & Austin for plaintiff.

F. B. Hendren and G. L. Park for defendant.

ALLEN, J. The motion for nonsuit is on the ground that the letter written by the defendant does not, by fair intendment, charge the plaintiff with the crime of larceny, or with an attempt to commit the crime of incest, and that if it does so the plaintiff admitted the truth of the charges contained in the letter.

The defendant fails to note the distinction between oral and written slander, or libel, the latter being actionable if it tends "to render the party liable to disgrace, ridicule, or contempt, and it need not impute any definite infamous crime. *Simmons v. Morse,* 51 N. C., 7." *Brown v. Lumber Co.,* 167 N. C., 11.

But the letter goes further than this, and is clearly susceptible of the meaning that the defendant intended to charge the plaintiff with crime, and it was for the jury to say in what sense the language was used.

In reference to the charge of larceny, *McCall v. Sustair,* 157 N. C., 181, bears a close resemblance to the present action.

Here the defendant wrote "he went to a man's stacks in the darkness of the night and got him a load of fodder," and in the *Sustair case* the defendant said his brother "ketched McCall taking some pokes of cotton out of his cotton patch the night before," and it was held that the judge "properly charged the jury that the burden was upon the plaintiff to find whether the words in view of the circumstances under which they were used naturally imported that the persons spoken of had committed the crime of larceny, and that the words were used with the intent to charge the plaintiff with larceny in uttering said words."

This is stronger than the *Sustair case* in that there is evidence of express malice in the letter, and the charges against the plaintiff are preceded by the statement, "I will have a suit for him when he comes over," which would incline one to the belief that the defendant intended to charge the plaintiff with crime, and to injure him.

Nor is it true that the plaintiff admitted the truth of the charges made against him.

He expressly denied any misconduct with his half sister, Cora, and while he admitted taking the fodder, his explanation of the transaction rebutted the idea of the presence of the felonious intent, which is an essential element of larceny.

We are therefore of opinion the motion for judgment of nonsuit was properly denied, and this covers all of the exceptions relied on in the brief, except to the refusal to permit certain witnesses to answer, when asked as to a conversation with Cora Hall, and an exception to the charge permitting the jury to assess punitive damages.

The following is representative of the three exceptions taken to the refusal to allow witnesses to speak of conversations with Cora Hall.

"Q. Did you ever hear Cora make any statement about W. O. Hall going to her home?

"Plaintiff objects; objection sustained, and defendant excepts.

"The defendant's counsel states that the foregoing question is asked for the purpose of mitigating damages."

It will be noted that there is no statement in the record that the answer to the question would be "Yes," nor is the purport of the conversation shown, and so far as we can see, of a new trial should be ordered, the witness might deny she had any conversation with Cora Hall, and the exceptions cannot therefore be considered. *Blue v. Brown,* 178 N. C., 336.

The charge on punitive damages is in accord with the authorities. *Fields v. Bynum,* 156 N. C., 418; *Ivie v. King,* 167 N. C., 177.

His Honor instructed the jury on the fourth issue as follows: "The burden of this issue is also on the plaintiff to satisfy you by the greater weight of the evidence that the words written were written with malice toward the plaintiff. What is malice, gentlemen of the jury? Malice is ill-will, spite. Did the words charge these crimes, and if so, were they written because the defendant had ill-will or spite toward the plaintiff? If you find by the evidence, and from its greater weight, that the words were written with malice, that is, was it ill-will and spite towards the plaintiff? then you will answer this fourth issue 'Yes.' If you do not so find, you will answer it 'No.'" And on the fifth, after considering compensatory damages: "In addition, gentlemen of the jury, to actual damages, if you answer the fourth issue 'Yes,' that is, that the words were written with malice toward the plaintiff, you may allow punitive damages. Punitive damages, sometimes called 'smart money,' are allowed in case where the injury is inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been malicious or wanton, displaying a spirit of mischief toward the plaintiff, or of reckless and criminal indifference to his rights, and when these elements are present damages commensurate with the injury may be

allowed by way of punishment of the defendant, but these damages are awarded on the grounds of public policy, for example's sake and not because the plaintiff has a right to the money. So, in addition to the actual damages, gentlemen of the jury, if you find that the plaintiff is entitled to recover damages at all you may allow punitive damages, that is, damages by way of punishment to the defendant for his conduct. In regard to this matter, and in answering the issue, you may find, first, what actual damages he has sustained, and then add to that such amount as you may find that the defendant shall be punished in this case by way of punitive damages, and the two together will be your answer to the issue, that is, if you decide to allow punitive damages against the defendant."

The charge is clear and accurate, and properly safeguarded the rights of the defendant.

No error.

J. W. LASLEY v. THE WALNUT COVE MERCANTILE COMPANY.

(Filed 19 May, 1920.)

1. Corporations — Insolvency — Dissolution — Actions — Shareholders— Statutes.

The statutory provision allowing a shareholder and certain others to maintain his action to dissolve a corporation for nonuser of its powers for two years or more consecutively, Rev., 1196, is not affected by the later statute, ch. 147, Laws 1913, requiring that he should own one-fifth of the stock, or that the corporation has failed to earn certain dividends, etc.; for this applies to going concerns, nor does the principle apply which requires him to first make application to the management to take this course, for this relates to suits concerning corporate management; and the judge having the matter before him in the course and practice of the courts "has jurisdiction of all questions arising in the proceedings to make such orders, injunctions, and decrees therein as justice and equity shall require, at any place in the district."

2. Same—Commissions—Sales—Mortgages—Trust Deeds—Foreclosure— Parties—Stay of Order to Sell.

Where a commissioner has been appointed by the court to sell the property of an insolvent corporation in a receiver's hands, and it appears that substantially the entire property has been advertised, and is about to be sold by a trustee under a deed of trust constituting a prior lien, the sale of the commissioner of the court will be stayed until the trustee and the lien creditor be made parties, and afforded an opportunity to be heard.

CIVIL ACTION to dissolve a corporation, heard on motion for receiver, etc., before *McElroy, J.*, on 4 October, 1919, from STOKES.

On the hearing the court finds, from the admissions in the pleadings and affidavits, that the Walnut Cove Mercantile Company is no longer exercising its powers under the charter, and has not done so since 1912; then gave judgment that plaintiff is entitled to the relief demanded in the complaint. That the corporation go into liquidation, and that John Hall be appointed receiver to take charge of its personal and real estate, etc.

Later, at Fall Term, 1919, Superior Court, Stokes County, his Honor, Judge Bryson presiding, a further order was entered, appointing W. Read Johnston, Esq., to take and state an account of the business affairs of the company, with a view to the distribution of its assets, and appointing J. W. Hall as commissioner to make sale of the real and personal property of the company, and that all stockholders be notified of the proceedings. To this judgment, also, defendant excepted, and later, in this Court, defendant, on notice duly issued, obtained an order restraining action of said J. W. Hall as commissioner of sale until the rights of the parties could be determined on appeal, etc.

J. D. Humphreys and E. B. Jones for plaintiff.
G. L. Jarvis and C. O. McMichael for defendant.

HOKE, J. Our statute on corporations, Revisal, ch. 21, sec. 1196, provides for involuntary dissolution of a corporation at the instance of the corporation itself or of any stockholder or creditor or of the Attorney-General of the State.

1. For the abuse of its powers to the injury of the public or of the stockholders or of its creditors or debtors.

2. For nonuser of its powers for two years or more consecutively.

3. When it has become insolvent or shall suspend its ordinary business for want of funds or be in imminent danger of insolvency.

4. Conviction of a criminal offense if such offense be persistent. Where, on facts presented, the court has power, under the statute, to dissolve a corporation for the reasons stated, both in the exercise of its general equitable jurisdiction and by the express terms of the law, ch. 21, sec. 1204, the judge hearing the matter, according to the course and practice of the court, "has jurisdiction of all questions arising in the proceedings, and to make such orders, injunctions, and decrees therein as justice and equity shall require, and at any place in the district.

"In the present cause, properly constituted, it has been made to appear and the judge has found that the defendant corporation has not attempted to carry on its corporate business since 1912. The case, there-

fore, comes directly within the provisions of the statute, and no reason is alleged or shown why the dissolution should not be had as prayed for in the complaint.

"It is urged for defendant that, under the provisions of a subsequent statute, ch. 147, Laws 1913, an application of this character can be entertained only at the instance of stockholders owning one-fifth of the paid-up stock," etc., but a perusal of the law in question will show that it is intended to control and regulate suits for the dissolution of a corporation doing business as a going concern, and by reason of the fact that they have not earned for three years next preceding the filing of the petition in net dividend of 4 per cent, or who have not paid a dividend for six years, and clearly has no application to an action to dissolve a corporation for nonuse of its powers, the case presented on this record.

Again, it is insisted that plaintiff, a stockholder, cannot maintain the present suit because he has not shown or alleged that he first made application to the directors or management to take action in the matter, citing *Merrimon v. Paving Co.*, 142 N. C., 539, and other cases.

The principle approved in these decisions is recognized as to suits concerning corporation management, to collect corporate claims, or, in some way, to enforce or regulate corporate action, but has no application to a suit to dissolve a corporation for nonuser of the powers where, as in this instance, the right to proceed is conferred on the individual stockholder by express provision of the statute, and without regard to the amount of his holdings.

It will be noted that, in addition to the principal judgment providing for a dissolution, there has been an order entered appointing a commissioner to make sale of the property. There is doubt if the validity of this order is presented in the case on appeal. The judgment, however, appears in the record, and as it also appears in the complaint or affidavit of plaintiff that a creditor of the corporation has a debt of $3,000 and more, and perhaps others secured by deed of trust on all the real property of the corporation, and constituting its principal assets, which antidates the institution of the present action, and that the trustee had advertised for sale under the deed, we consider it well that the order heretofore issued from this Court staying present action of said commissioner, shall be continued till the creditor and his trustee shall be made a party and afforded opportunity to be heard.

On the question directly presented we find no error, and, with the modification suggested, the judgment of the lower court is

Affirmed.

J. W. LASLEY v. A. M. SCALES, TRUSTEE FARMERS' UNION BANK, THE WALNUT COVE MERCANTILE COMPANY.

(Filed 19 May, 1920.)

1. Corporations—Receivers—Courts—Jurisdiction—Statutes.

The property of an insolvent corporation in a receiver's hands is *in custodia legis*, and the court having jurisdiction, by virtue of its general equitable powers, and by express provision of our statute, Rev., 1204, may "dispose of all questions arising in the proceedings, and make all such orders, injunctions, and decrees therein as justice and equity may require, at any place in the district."

2. Same— Liens— Mortgages— Deeds in Trust— Estates — Creditors — Equity.

In administering the equities of an insolvent corporation in its receiver's hands among its unsecured creditors and those having liens upon its property by mortgages and otherwise, the court having jurisdiction may take charge of the property affected by such liens, whether by mortgage, or deed of trust, etc., and observing the validity of such liens, may make sale of the property affected by them through its own appointees, in disregard of the minor requirements of the deeds or other instruments, etc., where such course works no substantial impairment of the value of the security and is for the best interest of the owners and others having claim upon the assets.

3. Same—Injunction—Restraining Orders—Powers of Sale—Parties.

A shareholder had a receiver appointed for his insolvent corporation, wherein pleadings had been filed and reference had, to ascertain the status of its indebtedness, and sought to enjoin the sale thereafter to be made of substantially all the insolvent's property by a trustee, under a deed of trust, executed theretofore and constituting a prior lien thereon, with allegations, and denials thereof, that the trustee and others were forming a corporation to purchase the property at a forced sale under the mortgage, to his irreparable injury, etc.: *Held*, the court, having jurisdiction, may disregard the power of sale contained in the mortgage, and observing the priorities, order the insolvent's property to be sold, for the best interest of lienors and other creditors; and that the remedy by injunction was available, but that the receiver was a proper and necessary party plaintiff to the suit.

4. Corporations — Receivers— Parties— Shareholders— Consolidation of Suits—Actions.

Where a receiver has been appointed, by a court having jurisdiction, of an insolvent corporation, at the suit of one of its shareholders, an injunction to prevent a sale under the power of a prior mortgage, to preserve its assets, etc., should be applied for by motion in the cause, and not by an independent suit by the shareholder; and where he has not been appointed at the time of the commencement of the shareholder's suit, this should be consolidated with the principal case, so that the court, having all parties before it in the same suit, will be enabled to make an authoritative and final disposition of the same.

LASLEY *v.* SCALES.

CIVIL ACTION, heard on motion for restraining order, before *McElroy, J.*, in STOKES, September, 1919.

No complaint was filed in the cause, but, on facts presented by affidavits of the parties, there was judgment restraining trustee from making sale presently and until the hearing.

Defendants excepted, and appealed.

J. D. Humphreys and E. B. Jones for plaintiffs.
G. L. Jarvis and C. O. McMichael for defendants.

HOKE, J. From the facts properly presented, it appears that, on 26 March, 1919, plaintiff, a stockholder of defendant, the mercantile company, instituted suit, under the provisions of the statute, to dissolve the corporation for nonuser of the powers, Rev., ch. 21, sec. 1196. Complaint and answer filed at Spring Term, 1919, Superior Court of Stokes County.

That on notice duly issued and facts admitted in the pleadings, etc., there was judgment entered in cause, 4 October, that said corporation go into liquidation, and J. W. Hall was appointed receiver to collect the assets, etc., and subsequently, at Fall term, Superior Court, Stokes County, before his Honor, Bryson, Judge, further orders were made in said cause that W. Read Johnston, Esq., be appointed to take and state an account of the affairs of the corporation, with a view to a distribution of the assets, and that the receiver, J. W. Hall, as commissioner of the court, make sale of the property of the corporation, and report to the court concerning it.

That after the filing of the pleadings in the principal cause, and prior to the adjudication thereon of McElroy, Judge, defendant, A. M. Scales, advertised the real estate of the corporation for sale, on 6 October, 1919, under a deed of trust antedating the suit, and made, so far as appears, to secure a debt to the defendant, the Union Bank and Trust Company, of $3,100, etc. Thereupon the plaintiff instituted the present action to restrain the sale, and filed affidavits showing the pendency of the action by him to dissolve the corporation and the filing of the pleadings therein, and also of a *lis pendens,* purporting to affect the property of the company, etc. That the mortgage or deed of trust is on all the realty of the company, consisting of several brick stores worth near $20,000; that the advertisement for sale under the deed is done at the instance of the defendant corporation, which has bought up a large part of the minority stockholders, and in connection with the Union Trust Company, the secured creditor is endeavoring to force a sale of the property with a view of buying it in by a syndicate to be formed for the purpose, and, if the proposed sale is allowed to proceed, it will result in a great sacri-

fice of the property, and to the irreparable injury of plaintiff and others in like case, etc. There were affidavits in denial of these averments, and thereupon the restraining order was entered, as stated. We have held at the present term, in *Lasley v. Mercantile Co., ante,* 575, that where the right to dissolve a corporation at the instance of a stockholder has been conferred by statute, and a Superior Court, having jurisdiction, may, by virtue of its general equitable powers, and by express provision of the law, Rev., ch. 21, sec. 1204, "dispose of all questions arising in the proceeding and make all such orders, injunctions, and decrees therein as justice and equity may require, and at any place in the district." And in furtherance of the principle, it is held for law in this jurisdiction that, while all valid and existent liens will be respected, a court, in the exercise of the powers referred to, may take charge of the property of the corporation, affected by such liens, whether by deeds of trust or other, and make sale of the same through its own appointees, and in disregard of the minor requirements of the deeds or other instruments, etc., where such course works no substantial impairment of the value of the security, and is for the best interest of the owners and others having claim upon the assets. *McLarty v. Urquhart,* 153 N. C., 339; *Pelletier v. Lumber Co.*, 123 N. C., 596; *Manning v. Elliott,* 92 N. C., 48.

In *McLarty v. Urquhart,* suit of foreclosure, in disregarding a requirement that the property be advertised in the *New York Herald*, and which requirement would entail or cost out of all proportion to the value of the property, the Court approved a decision in *Manning v. Elliott,* to the effect that a Court is not bound to decree a sale in strict accordance with the terms of the deed. "In this respect, it should exercise a sound discretion, having due regard under the circumstances of the case for the rights of the debtor and creditor." And in *Pelletier's case, supra,* the power of the Court to control and regulate the disposal of an insolvent corporation property in the hands of the receiver is fully recognized, and *Associate Justice Douglas*, in denying right of sale under prior lien without leave of Court, said: "Property in the actual or constructive possession of the receiver is in *custodia legis*, as the possession of the receiver is that of the Court, he being merely the hand of the Court. This exclusive possession of the receiver does not interfere with or disturb existing liens, preferences or priorities, but simply prevents their execution by holding the property intact until the relative rights of the parties can be determined.

"Another essential object sought to be obtained by the appointment of a receiver for an insolvent corporation is to prevent a sacrifice of its assets by a mutiplicity of suits and petty executions. Both of these objects would be destroyed by permitting any one, no matter what may

be his title, or claim to interfere with property *in custodia legis* without leave of Court, by which such custody is held," etc.

These general principles are in accord with well considered authority in other jurisdictions. *Wiswall v. Sampson,* 55 U. S. (14 Howard), p. 52, cited with approval in *Pelletier's case; Scott v. Crawford,* 16 Texas Civil Appeals, p. 47; *American Bank v. McGilligan,* 152 Ind., p. 582, and their proper application to the facts presented fully support the order restraining a sale by the trustee, it appearing that such a sale would withdraw the great bulk of the corporate property from the control of the court having jurisdiction of the matter, and probably result in a great sacrifice of the assets.

The injunction could more properly have been applied for by motion in the principal cause, and, to maintain it as an independent suit, the receiver should be made a party plaintiff, for it is more especially his province to institute and maintain actions to preserve the property for the benefit of all parties interested. At the time of suit commenced, however, he had not been appointed, and it appeared that present action was required.

On the record, we think it better that this suit be now consolidated with the principal case, to the end that, with all parties before it, the court will be enabled to make an authoritative and final disposition of the cause, and of all questions involved and presented in the same. *Ins. Co. v. R. R., ante,* 255, citing *Blackburn v. Ins. Co.,* 116 N. C., 821, and *Monroe Bros. v. Lewald,* 107 N. C., 655.

Modified and affirmed.

LOWER CREEK DRAINAGE COMMISSIONERS v. J. W. SPARKS ET AL.

(Filed 19 May, 1920.)

1. Courts—Jurisdiction—Justices of the Peace—Appeal—Superior Courts.

An appeal to the Superior Court from a justice of the peace confers only derivative jurisdiction on the Superior Court, depending entirely upon that of the justice's court from which the action was appealed, and in the absence thereof the Superior Court can acquire none.

2. Drainage Districts — Statutes — Liens — Actions— Courts— Personal Judgments—Proceedings in Rem—Contracts.

The lien upon the land of the owner in a drainage district when the amount of the assessment has been ascertained in accordance with the provisions of ch. 96, Public Laws of 1909, is by section 4 thereof, upon the lands designated, with right of action in the collector to enforce the lien, by subjecting thereto the land to be benefited or rendered more

productive, making the land the debtor, and not the owner thereof, and no personal judgment can be obtained against him, the action being exclusively *in rem*, and not founded on contract.

3. Constitutional Law—Courts—Jurisdiction—Actions—Justices of the Peace—Proceedings in Rem—Appeal—Superior Court.

Art. 4, sec. 27, of our State Constitution, by limiting the jurisdiction of justices of the peace to the sum of two hundred dollars in civil actions founded on contract, and in other civil actions to fifty dollars, value of property, deprives the Legislature of the authority to confer on justices' courts jurisdiction in actions to enforce a lien upon lands for assessment for benefits to the lands in a drainage district, such proceedings being against the land alone as the debtor, and there being no contractual relations between the owner and the drainage district formed under the statute, ch. 96, Public Laws of 1909; and the justice's court being excluded from exercising jurisdiction of this subject-matter, none can be acquired thereof by the Superior Court on appeal therefrom.

APPEAL by plaintiff from *Harding, J.*, at the December Term, 1919, of BURKE.

This is an action commenced before a justice of the peace, and heard in the Superior Court on appeal, to enforce an assessment against the lands of the defendants, levied by the commissioners of Lower Creek Drainage District under ch. 96, Public Laws 1909, which, after providing for the assessment, says, in sec. 4: "The assessment so levied shall constitute a lien upon the lands so assessed only, which shall be the lands designated by said freeholders in their report as injured or rendered less productive as aforesaid; and the said collector shall be empowered to bring an action in the name of the corporation to enforce said lien by subjecting the land intended to be benefited by rendering it more productive, either in the Superior Court or before a justice of the peace, and the court having jurisdiction of the amount due shall have power, upon summons served upon any of said landowners, as prescribed in cases where actions are brought to enforce money demands where said landowners shall fail to pay such assessment on or before 1 December of the year in which such assessment shall have power to adjudge that such assessment shall constitute a lien on the land assessed, and that the sheriff of the county shall sell the said land assessed to satisfy such assessment upon it, and the cost of the action so brought to enforce it; provided, however, that either the plaintiff or the defendant in such action shall have the right to appeal, as provided by law in other cases, upon giving bond in the sum of a hundred dollars."

The justice rendered judgment in favor of the defendants, and the plaintiff appealed, and in the Superior Court the action was dismissed for want of jurisdiction, and the plaintiff again appealed.

Mark Squires, R. L. Huffman, and S. J. Ervin for plaintiff.
Spainhour & Mull for defendant.

ALLEN, J. The jurisdiction of the Superior Court on appeal from a justice of the peace is derivative, not original, and if the justice has no jurisdiction of the action the Superior Court has none.

This has been decided many times in our Court.

In *Boyette v. Vaughan,* 85 N. C., 365, the Court said, in a unanimous opinion: "It is the jurisdiction of the justice of the peace which, on appeal, gives jurisdiction to the Superior Court, and of course if the justice had no jurisdiction, the Superior Court could have none"; and again, in *Ijames v. McClamroch,* 92 N. C., 365: "The jurisdiction of the Superior Court in appeals from justice's courts, is entirely derivative. If the justice in such cases has no jurisdiction of the action, the Superior Court can derive none by the appeal."

Both of these cases were cited and approved in *Robeson v. Hodges,* 105 N. C., 49, in an opinion written by *Chief Justice Clark,* in which he quotes from the first that "It is the jurisdiction of the justice of the peace which, on appeal, gives jurisdiction to the Superior Court, and, of course, if the justice had no jurisdiction the Superior Court could have none, and, therefore, by allowing an amendment in the transcript, which enlarges the cause of action beyond the jurisdiction of the justice it must necessarily oust itself of jurisdiction"; and the same learned judge concurred in the opinion written by *Chief Justice Furches* in *S. v. Wiseman,* 131 N. C., 795, in which it was said: "In cases where bills are found in the Superior Court, its jurisdiction is original. But in cases of appeal from justices of the peace its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and if the justice had none, the Superior Court had none."

Hoke, J., says, in *Cheese Co. v. Pipkin,* 155 N. C., 396: "The cause having originated in the court of a justice of the peace, questions of jurisdiction must be considered and determined in reference to that fact, and numerous and repeated cases with us are to the effect 'That the jurisdiction of the Superior Court on appeals from a justice of the peace is entirely derivative, and if the justice had no jurisdiction, in an action as it was before him, the Superior Court can derive none by amendment.' *Ijames v. McClamrock,* 92 N. C., 362. A principle fully approved by the present *Chief Justice,* delivering the opinion of the Court in *Robeson v. Hodges,* 105 N. C., 49, and reaffirmed and applied at the present term in *Wilson v. Ins. Co.,* 155 N. C., 173.

All of these authorities are cited and approved in *McLaurin v. McIntyre,* 167 N. C., 353.

The question, therefore, presented by the appeal is, Did the justice have jurisdiction of the action?

The Constitution of the State (Art. IV, sec. 27) limits the jurisdiction of justices in civil matters to "civil actions founded on contract wherein the sum demanded shall not exceed two hundred dollars," and authorizes the General Assembly to confer jurisdiction in "other civil actions wherein the value of the property in controversy does not exceed fifty dollars," and as there is neither allegation nor proof of any contract between the plaintiff and defendants as the foundation of the action, and there is no property in controversy, but simply the question of liability for an assessment, the justice had no jurisdiction.

Assessments are sustained upon the ground of benefit to the property, which is the debtor, and not the owner of the property.

"The lien of the charges for drainage is not a debt of the owner of the land therein, but is a charge solely upon the land, and accrues *pari passu* with the benefits as they shall accrue thereafter. They are not liens until they successively fall due, and are presumed to be paid out of the increased productiveness and other benefits as they accrue from time to time. These assessments are to be levied from time to time to pay, not the indebtedness of the owner of any tract, but to pay the bonded indebtedness of the district." *Pate v. Banks,* 178 N. C., 141.

This case also notes the distinction between assessments and laborer's and mechanic's liens, which must have a debt on which a personal judgment may be recovered, to rest on, the last being represented by *Smaw v. Cohen,* 95 N. C., 85; *Weathers v. Borders,* 124 N. C., 610, in which the plaintiff relies, and holds that, "These 'public charges' are entirely different from a mortgage which is to secure an indebtedness of the mortgagor for a benefit such as money borrowed, or other purpose, already received, nor like the laborer's or mechanic's lien, which is for benefit already received, and which is primarily a personal debt of the employer."

It says further, "'Pavement' assessments, as is said in *Raleigh v. Peace,* 110 N. C., 32, are like these assessments for drainage purposes, being 'founded upon the principle that the land abutting upon the improvement receives a benefit over and above the property of the citizens generally, and should be charged with the value of such peculiar benefits,' and 'do not authorize a personal judgment against the owner of the property,'" thereby approving the decision in *Raleigh v. Peace* that a statute providing for a personal judgment "is invalid," and under the same principle the General Assembly cannot confer jurisdiction on justices denied by the Constitution.

No stronger proof can be produced to show that the plaintiff's cause of action is not "founded on contract" than the statement of our Court

that no personal judgment can be recovered, because we recognize fully, as a part of the obligation of contracts, the right to enforce payment by judgment and executions.

The question is, however, settled against the plaintiff in *Canal Co. v. Whitley,* 172 N. C., 102, which was an action commenced before a justice of the peace to recover an assessment of $45, levied under the drainage laws, in which the Court says, by unanimous opinion, "We are of opinion, however, that this action will not lie, and that the justice of the peace has no jurisdiction to entertain it. It is not a debt, and does not arise *ex contractu.*"

We are therefore of opinion there is no error.

Affirmed.

CLARK, C. J., dissenting: The statute under which this proceeding was instituted is very plain. It provides that the "collector shall be empowered to bring an action in the name of the corporation to enforce said lien by subjecting the land intended to be benefited by rendering it more productive *either in the Superior Court or before a justice of the peace,* and the court having jurisdiction *of the amount due* shall have power, upon summons served upon any of said landowners as prescribed in cases where actions are brought to enforce money demands where said landowners shall fail to pay such assessment, on or before the first of December of the year in which such assessment shall have been levied; and the court on trial shall have power to adjudge that such assessment shall constitute a lien on the land assessed, and that the sheriff of the county shall sell the said land assessed to satisfy such assessment upon it, and the cost of the action so brought to enforce it."

This statute authorizes the Court to declare the assessment a lien, *for the amount,* and if the amount is under $200 the jurisdiction is in the court of the justice of the peace, and if over that amount it is in the Superior Court, and upon the declaration of the lien the sheriff proceeds to sell to collect said sum.

This is precisely the case of *Smaw v. Cohen,* 95 N. C., 87, where the Court held that an action to enforce a lien for materials and work and labor done, which is for less than $200, is in the jurisdiction of a justice of the peace, *Smith, C. J.,* saying: "The present action, though instituted as well to enforce the lien as to establish the debt to which it attaches, is, by the law, required to be prosecuted in the court having jurisdiction, *according to the amount claimed* under the contract and in no other. The statute must control and modify the general rule, as laid down in those cases, and as it denies jurisdiction in the Superior Court for the sum demanded we cannot assume and undertake to exercise it." In *Smaw v. Cohen* the action was to enforce a lien against the

land of a *feme covert* who at that time could not be liable on a contract, but the proceedings to declare the amount of the lien was held to be before the justice of the peace and the sheriff proceeded to collect. That case is exactly on all fours with this.

In *Farthing v. Shields,* 106 N. C., 300, *Shepherd, J.,* said: *"Smaw v. Cohen,* 95 N. C., 85, may be sustained, as to the liability of the separate estate, on the ground that the statute, Code, ch. 41 (liens) directly charges it," which is exactly the case here. This is not an action to collect a debt, but to adjudge the *amount* of the lien, which is within the jurisdiction of the justice, and then the sheriff proceeds to collect.

In *Weathers v. Borders,* 124 N. C., 611, *Furches, J.,* says: *"Smaw v. Cohen* is authority for holding that where the debt sued for is less than $200, the action should be brought before a justice of the peace; and that where the debt is established by the judgment, the statute creates a lien. But where the debt is less than $200, and it is sought to establish an equitable lien, the action must be brought in the Superior Court as a justice of the peace has no equitable jurisdiction."

In *Finger v. Hunter,* 130 N. C., 532, the Court said: "The proceeding being for a lien under $200 was properly brought in the justice's court. *Smaw v. Cohen,* 95 N. C., 85."

In *Harvey v. Johnson,* 133 N. C., 358, *Walker, J.,* says: "The act of 1901 is an amendment to sec. 1781 of the Code, which subjects the property upon which the repairs or improvements are made to a lien. This brings the case directly within the reason for the decision in *Smaw v. Cohen,* 95 N. C., 85. In that case the jurisdiction of the justice was sustained by reason of the express requirement of the statute that a suit against the person to enforce such lien, when the amount is less than $200, shall be brought in a justice's court."

In *Ball v. Paquin,* 140 N. C., 95, *Connor, J.,* says: "In *Smaw v. Cohen,* 95 N. C., 85, it is held that an action against a married woman to enforce a lien for an amount less than $200 was within the jurisdiction of a justice of the peace." In all these cases, as in the present, there was no personal judgment against the defendant, for at that time the Martin Act had not been passed, and it was held that a personal judgment could not be obtained against a married woman.

In *Rutherford v. Ray,* 147 N. C., 258, it is said by *Connor, J.:* "In *Smaw v. Cohen,* 95 N. C., 85, it is held that the justice has jurisdiction of an action to enforce a lien against the property of a married woman if the sum demanded is less than $200. This decision is based upon the language of the statute. It will be observed that the statute uses the words 'according to the jurisdiction thereof.'"

All these cases are exactly in point, for in them no personal judgment could be rendered against the defendant, a married woman, but the

Court sustained the jurisdiction because the amount for which the lien was adjudged was less than $200, and the lien was not equitable, but statutory, and the sheriff proceeded to collect. In those cases, as in this, it was not sought to decree an equitable lien, but the lien was created by the statute, as a result of the final decree establishing the drainage district, and the justice merely adjudged the amount due under the lien.

This renders it unnecessary to consider the other reasons assigned in the opinion of the Court, for if, as these cases hold, the magistrate has jurisdiction the appeal ought not to have been dismissed. Under our practice, the Court does not favor dismissing an action for want of jurisdiction if the Court can sustain it, nor requiring the heavier cost, and the delay, involved by proceeding in the Superior Court when the justice of the peace has jurisdiction of the amount.

Civil causes of action are divided into those on contract and torts. It is this division that is referred to in prescribing the jurisdiction of justices of the peace to "civil actions founded on contract, wherein the sum demanded shall not exceed $200, and wherein the title to real estate shall not be in controversy," and "of other civil actions wherein the value of the property in controversy does not exceed $50." This last was construed in *Malloy v. Fayetteville,* 122 N. C., 480, to authorize justices to take cognizance of actions for damages not exceeding $50 to property. Justices were not given jurisdiction of torts, but that jurisdiction of contracts was not restricted to the narrower meaning of agreements is shown by the fact that indebtedness for a tax, on a lien and under a judgment, are construed to be contracts, though the debtor cannot be said in either case to have agreed to be liable.

S. R. MORRISON v. JOEL WALKER.

(Filed 19 May, 1920.)

1. Pleadings—Contracts—Breach—Evidence—Admissions.

The plaintiff brought action to recover certain lumber which he had cut on defendant's lands under contract, that he was to pay a certain price per thousand feet before removing it, alleging that he had paid therefor in two different lots, which the defendant generally denied, but further alleged specifically that the plaintiff had paid him for a certain number of feet, which appeared to be the sum total of the two lots of the plaintiff's allegation: *Held*, an admission of the pleadings that precludes the defense that the plaintiff had not paid for the lumber under the terms of the contract, and therefore was not entitled to recover it.

2. Pleadings — Contracts— Specific Performance— Actions— Defenses— Payment—Immaterial Matter.

The plaintiff brought action to recover certain lumber that he alleged he was entitled to under a contract of purchase with the defendant requiring that he pay the defendant a certain price per thousand feet for it when he had cut it, before he removed it from the defendant's land; and the defendant alleged that the plaintiff had breached his contract in only cutting the most accessible timber, and not all of the timber on the lands, as the contract required: *Held*, it was not open for the defendant to show, under the pleadings, and without allegation, that the plaintiff had breached his contract by not having paid an insignificant part of the purchase price before attempting to remove the lumber from the defendant's land, of which both parties were then unaware, and which was not definitely ascertained until after the verdict.

3. Evidence— Values— Damages—Disqualification—Appeal and Error— Objections and Exceptions.

Where exception is made on the trial to the admission of testimony of the value of certain lumber, involved in the issue of damages, and the only witness testifying afterwards, states that there were different kinds of lumber with different values; that he had not seen the lumber, and did not know the quality of each kind, but knew its value in comparison with that of other lumber he had sold from the land: *Held*, the exception should have been sustained in the first instance, or the evidence stricken out when the witness's disqualification was shown.

APPEAL by defendant from *Harding, J.*, at the October Term, 1919, of BURKE.

This is an action to recover certain lumber cut by the plaintiff on the land of the defendant, under contract, and which defendant refused to allow the plaintiff to remove.

The jury returned the following verdict:

"1. Is the plaintiff the owner and entitled to the possession of the lumber described in the complaint, as alleged? Answer: 'Yes.'

"2. Does the defendant wrongfully withhold the possession of the lumber described in the complaint from the plaintiff? Answer: 'Yes, as to the 60,000 feet; no, as to 4,335 feet.'

"3. What was the value of the lumber taken by the defendant under his replevy bond in the claim and delivery proceedings on the date that it was taken? Answer: '$579.91.'

"4. What damage, if any, has plaintiff sustained by reason of the defendant wrongfully and unlawfully withholding the possession of the same from the plaintiff? Answer: '6 per cent interest.'

"5. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: '$579.91, with interest on $540 at 6 per cent per annum from the first day of this term.'

"6. What damage, if any, is the defendant entitled to recover of the plaintiff on his counterclaim? Answer: '$25.' "

Judgment was entered in favor of the plaintiff, from which defendant appealed.

The exceptions relied on are stated in the opinion.

Avery & Hairfield, A. A. Whitener, and R. L. Huffman for plaintiff.
Avery & Ervin and Spainhour & Mull for defendant.

ALLEN, J. "The contract executed by the defendant, and under which the plaintiff operated, conveys all the timber on a certain tract of land, with the right to enter upon the land and cut and remove the same, with provision that the defendant should be paid $1 per thousand before removing off said land," and the verdict, interpreted in connection with the pleadings, the evidence, and the charge, shows that the plaintiff cut two yards of lumber, aggregating about 115,000 feet, which he removed after paying the defendant therefor, and that he afterwards cut another yard, supposed to contain about 60,000 feet, but which really amounted to 64,335 feet, and that he paid the defendant $60 for this last yard, leaving due on the yard $4.33, although this was not ascertained until the verdict, and that the defendant then refused to allow the plaintiff to remove the lumber, and this action was commenced to recover it.

On these facts the defendant, by demurrer *ore tenus,* and by exceptions to the charge of the court, presents the question of the right of the plaintiff to maintain his action, insisting that as the plaintiff did not pay the full amount due for the last yard of lumber no title vested in him, on which he can recover.

In other words, the defendant invokes the doctrine of strict performance of the terms of the contract, and by its aid seeks to hold lumber which the receivers in this action have sold for $500 because the plaintiff failed to pay $4.33 of the purchase price, when neither the plaintiff nor defendant knew this amount was due.

We do not think the position is open to the defendant on the pleadings.

The plaintiff, in the third paragraph of the complaint, after stating the facts as to cutting and removing the first two yards of 115,000 feet after paying therefor, alleges that he "had cut a second yard of lumber and had the same hacked and put on sticks in accordance with said contract, the amount of lumber of said second yard being 60,978 feet, for which plaintiff was due defendant under said contract at one dollar per thousand feet the sum of $60.98, and plaintiff paid defendant $60, though defendant was due and owing plaintiff at the time over $30 for mill-culls taken and removed by defendant from the first yard of lumber of plaintiff, and for which defendant has refused to pay, though demand has been made for payment of same."

The defendant says in reply: "Answering the third section of the complaint, this defendant admits that one Hilderbran, representing himself as agent for the plaintiff, entered upon a portion of defendant's land, and cut about 175,000 feet of lumber, and that plaintiff paid defendant at the rate of $1 per thousand feet therefor."

Note that 175,000 feet covers the yard in controversy, as there were only 115,000 feet in the first and second yards.

The defendant then alleges that under the contract with the plaintiff he was required to cut all the timber on the land amounting to 500,000 feet; that he failed to perform his agreement, and, on the contrary, only cut 175,000 feet, and this of the timber easiest of access, and he demands damages for this breach of the contract, and in the fourth paragraph of the answer he says he refused to permit the plaintiff to remove the last yard because of the above breach, and does not refer to the failure of the plaintiff to pay in full for it.

This is, as it appears to us, an admission that the plaintiff paid for all the timber he cut, and, if so, no issue of payment was raised by the pleadings, and no question as to the right to maintain the action, because of failure to pay a small amount, finally discovered to be due.

Again, if payment was not admitted the defendant refused to allow the plainitff to remove the timber upon the distinct ground that the plaintiff had breached the contract by failing to cut all the timber on the land, and he will not be permitted now to assign another and different objection, which could have been easily removed if made at the time.

"The strict performance of a contract may be waived. A person for whose benefit anything is to be done, may, if he pleases, dispense with any part of it, or circumstance in the mode of performance. Where he is present to receive performance, whatever is not exacted is considered as waived, for if objection had been made on the ground of those matters in which the proposed performance was deficient, these might have been supplied at the time, and therefore it is not proper to surprise the party who performed the act, by an objection to the mode of performance, after his vigilance has been disarmed by an apparent acquiescence, for that would be a fraud." 6 R. C. L., 990; *Decamp v. Foy*, 9 A. D., 372.

Nor should the right to maintain this action be denied because of failure to pay $4.33 on a contract for lumber worth more than $500 when the exact amount due had not been ascertained, and after acceptance by the defendant of a check for the lumber, without objection before the action was commenced, so far as the record discloses, that payment in full had not been made.

In *Westerman v. Fiber Co.*, 162 N. C., 295, the plaintiff contracted to cut 50,000 cords of wood, for which the defendant was to pay $3 per cord, and the defendant further agreed to build certain shacks for housing the plaintiff's hands, which it failed to do.

It was held that the failure to build the shacks did not justify the severance of the contract relation, and of this phase of the case the Court said: "It is not every breach of contract that will operate as a discharge and justify an entire refusal to perform further. Speaking generally to this question, in Anson on Contracts, p. 349, the author says: 'But though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that relieves him from doing what he has undertaken to do.' The contract may be broken wholly or in part, and if in part, the breach may not be sufficiently important to operate as a discharge, or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained."

We are, therefore, of opinion the plaintiff has the right to prosecute this action, but there is error in the admission of evidence on the issue of damages which entitles the defendant to a new trial on that issue.

For the purpose of showing the value of the lumber, the following question was propounded to the plaintiff, S. R. Morrison, while testifying as witness in his own behalf:

"What was the market value of that lumber per thousand feet at the time of the institution of this action?" Defendant objected; objection overruled, and defendant excepted.

The witness answered: "It was worth $18 per thousand feet."

On cross-examination he testified: "I never saw the lumber I took claim and delivery for; I certainly am swearing to the value of it. I didn't know how much pine there was of it to my own knowledge; don't know how much oak there was of my own knowledge. The price of poplar and oak is very near the same price; don't know how much poplar there was of my own knowledge. There is a difference in the price of pine and poplar. I didn't see the lumber. I can swear to the value of it because I know how much it cost to get it put there where it was, and I know what I got for the other lumber I sold off the same tract—it certainly was worth as much as the other was. I know because I got part of it, one yard of it, and sold it. I know how much was there, but not of my own knowledge. If that had been half pine, there would have been a difference. I can't swear there was the same proportion of pine in this as the one I sold. Of my own knowledge, I don't know what the lumber was worth."

There is no other evidence of value in the record, and as the witness had never seen the lumber, knew nothing of the grade, and had no knowledge of the different kinds of lumber, of unequal value in the yard, he ought not to have been permitted to testify in the first instance, or his evidence ought to have been stricken out when his disqualification was shown.

New trial on issue of damages.

JOSEPHINE POPE WHITE v. CHARLES H. WHITE.

(Filed 19 May, 1920.)

1. Summons— Service— Publication— Affidavit— Divorce—Husband and Wife—Statutes.

Order of publication of service of summons in an action by the wife for divorce is not objectionable as irregular, for the failure of the affidavit to set forth a good cause of action, when there are therein allegations that the husband had abandoned his wife, had left the State after having wrongfully appropriated her separate property to his own use, leaving her without support, and had subjected her to an inquisition of lunacy, and is now professionally engaged in another State upon a good salary, etc.; and this principle also applies to a suit of the wife to recover lands purchased by the husband with her separate money, and title taken in himself without her consent, and in either case publication may be made under Rev., 442, subsecs. 4 and 5.

2. Appeal and Error—Findings—Judgments—Motion to Set Aside—Movant's Notice—Evidence.

The finding, without evidence, by the trial judge as to lack of notice, on a motion to set aside a judgment in an action wherein service of summons had been made by publication, is insufficient, and a finding that the defendant had no notice whatever will not be allowed to control on appeal, especially when the record shows that he had attempted a compromise after knowledge of the action and before judgment, through his attorney.

3. Alimony—Husband and Wife—Allowance—Judgments—Restitution.

Alimony regularly ordered to be paid a wife *pendente lite* her action for divorce may be increased or reduced in amount by the court from time to time, but that which she has already received in the course and practice of the courts may not be ordered to be given up by her.

4. Alimony—Husband and Wife—Liens—Judgments—Sale of Land—Statutes.

Where alimony *pendente lite* has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described

in the complaint and situate here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. Rev., 1566.

5. Appeal and Error—Alimony—Judgments.

An order allowing the wife alimony *pendente lite* her action for divorce may be declared erroneous on appeal for insufficiently full findings of fact therein, but not void.

6. Judgments— Attachment— Notice— Statutes— Summons— Service by Publication.

Attachment of the lands situated here of the nonresident husband, is not necessary to subject it to the payment of alimony regularly allowed the wife *pendente lite* her suit for divorce, upon publication of summons, or to declare the husband her trustee in his purchase of lands with her separate money, to which he had taken title in himself, without her consent, nor in either case is any notice required beyond publication of summons. Rev., 449.

7. Attachments—Pleadings—Judgments—Alimony—Liens.

The allegations of the complaint particularly describing the lands situate here of the nonresident husband sought to be subjected to the wife's claim for alimony in her suit for divorce, and the judgment therein directing it to be sold accordingly, practically amount to an attachment of the lands indicated.

8. Judgments— Motions to Set Aside— Statutes— Notice — Alimony — Limitation of Actions.

The provisions of Rev., 449, as to setting aside judgments against nonresident defendants served by publication, upon motion showing sufficient cause, made within a year after notice, and within five years after its rendition on such terms as may be just, with restitution, etc., does not apply where the lands have been regularly sold under an order of court in divorce proceedings, of which the defendant had notice, to pay the wife alimony which had been allowed her.

9. Judgments—Motions to Set Aside—Affidavits—Evidence—Meritorious Defense.

Allegations by the movant to set aside a judgment, for irregularity, that he has "a good and meritorious defense," is but his own opinion, and is insufficient; nor is it aided by erroneous statements of matters of law or of conflicting facts that have been judicially found adverse to his contentions.

10. Same—Limitation of Actions.

No "good cause is shown" to set aside a judgment allowing alimony to the wife *pendente lite* her action for divorce, or in a suit to declare him her trustee in taking title to lands bought with her money and without her consent, where publication of summons has been regularly made, under Rev., 449, and in proceedings regular upon their face, when the motion has been made after a lapse of nearly five years, the defendant had actual knowledge of the action, and the death of the wife has caused the loss of the evidence upon which the judgments were rendered.

11. Parties—Judgments Set Aside—Motions—Title—Husband and Wife.

The devisee of the wife is a necessary party to proceedings to set aside judgments theretofore rendered in her favor against her husband, affecting the title to lands, which are the subject-matter of the devise.

ALLEN, J., dissenting; BROWN, J., concurring in the dissenting opinion.

APPEAL by plaintiff from *Webb, J.*, at chambers, September Term, 1919, from MITCHELL.

In February, 1914, the plantiff brought two suits against the defendant, one for divorce *a mesna et thoro* and alimony, and the other for the purpose of declaring the defendant a trustee, holding the title to certain land for plaintiff. Both actions were brought at the same time, and the return term was April Term, 1914, of Mitchell. The defendant could not be found in the State, and service in both actions was made by publication. At July Term, 1914, the plaintiff obtained a judgment in the one case of $500 for alimony, and in the other case the defendant was declared a trustee as holding the title to a certain parcel of land for the plaintiff. A tract of land which was owned by defendant, and to which plaintiff claimed no title, was sold 2 November, 1914, under execution issued upon the judgment obtained for alimony, at which sale the plaintiff became the last and highest bidder, and she obtained title under the sheriff's deed. On 26 March, 1919, and after the death of the plaintiff, who had made a will devising this property to the Episcopal Church, the defendant, a nonresident, through his counsel made a motion to vacate both of said judgments upon the ground that he did not know of the judgments until after 1 January, 1919; that service had been had on him by publication, and that no attachments had issued in said causes.

The court set aside the judgment in both cases, and the plaintiff appealed.

S. J. Ervin and Charles E. Greene for plaintiff.
Hudgins, Watson & Watson for defendant.

CLARK, C. J. The cases being between the same parties, and the facts as to both being substantially similar, they can be treated as one in this appeal.

In the first case, the wife, Josephine White, brought an action against her husband, the defendant, Charles H. White, for divorce *a mensa et thoro* and alimony. Upon inspection of the record, the proceeding was regular and according to the course and practice of the Court in every particular. It appearing upon affidavit that the defendant could not after due diligence be found in this State, and that a cause of action existed against the defendant for divorce and alimony, it was ordered

that publication be made in the manner required by law, and that said publication was duly made requiring the defendant to answer at the term of Mitchell Superior Court beginning the first Monday in April, 1914. The complaint was in regular form, and alleged that the parties were married; that the plaintiff had been a dutiful and faithful wife in every respect; that the plaintiff at the time of the marriage had some money, and an income with which she purchased their home in this State; that the defendant abandoned her; that she discovered that the defendant and a woman whom he had engaged as housekeeper had improper relations, whereupon the plaintiff drove her off; that the defendant, in 1911, soon after, abandoned the plaintiff and left the State; that in April, 1912, he returned to this State, and caused the plaintiff to be arrested upon the charge of insanity, and brought before the clerk for examination, who after such examination discharged the plaintiff and taxed the defendant with the costs. She further alleged that the house and lot on which she lived had been bought with her money, but the defendant had taken title in his own name. She further alleged that the defendant was then a professor in Harvard University obtaining a salary of $3,000 to $4,000. Whereupon she asked for alimony pending the action, and for a decree that the judgment should be declared a charge upon the land of defendant, which was fully described in the complaint. The affidavit to the complaint is in due form, as was the judgment and all the proceedings therein by which the judge allowed her $500 for alimony pending the action up to November Term, 1914, and decreed the same should be a lien on the property of the defendant in Mitchell County, which was set out and described in the complaint. Execution regularly issued upon this judgment, and under it, the said property was sold and purchased by the plaintiff 2 November, 1914, as returned by the sheriff on said execution, at the sum of $500, which was entered as a credit on the judgment in favor of the plaintiff against the defendant. The plaintiff died in November, 1918, and the defendant, on 25 March, 1919, gave notice that he would move at the next term of the Superior Court to set aside the two judgments entered against the defendant at July Term, 1914, of Mitchell.

On hearing the motion, his Honor set aside both judgments in September, 1919, upon the ground that the defendant, Charles H. White, had no notice either of the pending suit or of the judgment rendered at July Term, 1914, until January, 1919; that the defendant has a good and meritorious defense; that no attachment was ever issued or levied in the cause. The plaintiff in the original judgment died in the latter part of 1918 and her executor, J. A. Gouge, qualified as her executor, and appeared in this cause to resist the motion.

His Honor was erroneously of the opinion that the failure to obtain personal service upon the defendant, or to obtain an attachment as a basis of the proceeding was an irregularity. The plaintiff excepts that there is no evidence which warranted the court in finding as a fact that the defendant had no notice of the proceeding.

The case on appeal states that there was no evidence on behalf of the defendant except his own affidavit in which he testifies that he "was never served with summons in either of the above named cases, and never heard of either judgment being entered against him until the first day of January, 1919." He does not testify, as the judge inadvertently found, that he "had no notice whatever, either of the pending suit, or of the judgment signed until January, 1919." On the contrary, there is the affidavit of M. L. Wilson, the counsel who brought these actions, who testified that after the complaints had been filed, and before judgment was taken, at the request of Mr. J. W. Pless, counsel for the defendant, he had a conference with him for a settlement of the matters in controversy, that a settlement of said cases was agreed upon, the terms of the said agreement drawn up in legal form, and signed by the attorneys on both sides, but subject to the approval of the defendant, and later the counsel for the defendant informed him that his client had declined to approve the settlement, and thereafter the judgments were regularly obtained. Where there is any evidence, the findings of fact by the court are conclusive, but when there is no evidence to sustain a finding of fact, it must be set aside. In corroboration of the testimony of M. L. Wilson are the affidavits of J. A. Gouge that in October, 1916, more than two years after judgment was taken in both said cases, the defendant wrote him from Cambridge, Mass., about the property, and said that his wife's need was not so urgent, as she was in possession of the property, and though she could not sell it at the price she wanted, she ought to be able to get a loan upon it as security, and a copy of his letter to that effect is attached. There was no evidence offered that the defendant did not have notice of these actions prior to the judgment.

Alimony is an allowance for the support of the wife, and the amount may be increased or reduced, for cause, from time to time. But it is never ordered to be paid back, as is sought in this case—especially would this be inconceivable as to alimony *pendente lite*, and after the lapse of nearly 5 years and the death of the wife.

The defendant is an educated man. After abandoning his wife for another woman, as the sworn complaint avers (to which he did not attempt to file answer during her life), he was a professor at Harvard, and during these long years of absence he had knowledge of the actions the settlement of which by his counsel he refused to ratify, and that

his wife in some way had come into possession of the lands he left here.

Upon the uncontradicted affidavits set out in the record the court should have found that the defendant did have notice of the institution and pendency of said action. While we cannot find the facts, we must hold upon this record that there was no evidence justifying the finding that the defendant had no notice of the pendency of the suit, and the proceedings being regular upon their face in all respects, such finding is reversed. *Marsh v. Griffin,* 123 N. C., 669; *Ricaud v. Alderman,* 132 N. C., 64. The affidavit of the defendant that he did not have notice of the judgment till recently is very far from denying knowledge of the pending actions in ample time to make defense, as appears from the affidavit of M. L. Wilson as to the settlement in writing of the matter in controversy with defendant's counsel and defendant's letter to Gouge as to the wife's possession of the property, which show that he had full opportunity to make his defense.

Rev., 1566, authorized the allowance of support and alimony to the deserted wife, and gives to the court ample power to declare the same a lien on the land of the defendant, described in the complaint, and order the sale of the land to pay it. *Bailey v. Bailey,* 127 N. C., 474. The *proviso* in that section provides that "If the husband shall have abandoned his wife and left the State, . . . no notice shall be necessary," of the application for alimony *pendente lite*.

"The purpose of this enactment is to afford the wife present pecuniary relief pending the progress of action." *Moore v. Moore,* 130 N. C., 334; *Morris v. Morris,* 89 N. C., 111. Application for alimony *pendente lite* may be made by motion in the cause. *Zimmerman v. Zimmerman,* 113 N. C., 432; *Reeves v. Reeves,* 82 N. C., 348.

In *Zimmerman v. Zimmerman, supra,* it is said: "The requirement that the judge shall find such allegations of the complaint to be true as will entitle plaintiff to order applies only where such allegations are controverted." In this case, it appeared that the defendant was absent from the State, and could not be found, both the order of Judge Long and in the judgment of the clerk ordering publication upon that finding. The judgment of Judge Long at July Term, 1914, decreeing alimony recites that the "defendant had been served by publication in the action for divorce, and also for alimony, at April Term, 1914, of the Superior Court of Mitchell; that a motion had been made by plaintiff at said term, and had been continued, and it appearing further to the court that the plaintiff had not received any support from the defendant since January, 1913," it was "adjudged by the court that the plaintiff be allowed the sum of $500 as alimony pending this action up to November Term, 1914, of this court, and the same is hereby con-

stituted a lien on all property of the defendant in *Mitchell County,* as set out and described in the complaint."

In *Bailey v. Bailey,* 127 N. C., 474, it is held: "Land of a husband who is out of the State may be charged with alimony *pendente lite,* and attorneys' fees." In *Sparks v. Sparks,* 69 N. C., 319, it is said: "Upon the wife making out a *prima facie* case she is entitled to alimony *pendente lite.*" The orders in this case adjudge that she was unable to give bond, and she was allowed to sue *in forma pauperis,* and the judgment recites that her husband had given her no support since January, 1913, which facts are held to be sufficient to justify such order. *Miller v. Miller,* 75 N. C., 70. If the findings of fact in the judgment had been not full enough the order would not have been void, but simply held erroneous on appeal. *Moody v. Moody,* 118 N. C., 926.

No notice other than by publication, nor any attachment was necessary in either of these cases. Rev., 442, provides that service by publication is sufficient when, as here, "The person on whom the service of summons is to be made cannot, after due diligence, be found within the State, and the fact appears by affidavit to the satisfaction of the court, or to a judge thereof, and in like manner it appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases: . . . 5. Where the action is for divorce."

Subsec. 4 of said sec. 442 provides that such service by publication may be made "Where the subject of the action is real or personal property in this State, and the defendant has, or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein." This applies to the action to declare the defendant trustee for his wife as to the tract bought with her money. *Hoke, J., Vick v. Flournoy,* 147 N. C., 213; *Graham v. O'Bryan,* 120 N. C., 463.

In *Bernhardt v. Brown,* 118 N. C., 705, the Court said: "Proceedings in divorce are *sui generis* as the judgment therein merely declares a personal status, and publication of the summons is allowed without the acquisition of jurisdiction by attachment of property, the court having jurisdiction of the person of the plaintiff." This is a well settled principle of law, and that case has been often cited since with approval. See Anno. Ed. In such cases an attachment is not necessary to complete the service of summons, but at option of plaintiff there may be an attachment "to secure the property so that it may be held to satisfy the judgment when rendered, and also as a basis for the publication of the summons. The wife always has a remedy of gar-

nisheeing the salary or wages of her husband in such cases, and she is entitled to an attachment of the property for the same reason. Otherwise the defendant, pending litigation, can sell or convey his property, or creditors may attach it for debt or obtain prior liens by judgment." *Walton v. Walton,* 178 N. C., 75.

While the attachment in the divorce proceeding was not necessary to complete the service, it was practically made in this case, by describing in the complaint the property sought to be subjected to the payment of alimony and the recital in the judgment that property so described was directed to be sold for payment of the judgment.

The defendant, however, relies upon Rev., 449: "The defendant against whom publication was ordered, or who is served under the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, *except in an action for divorce* the defendant against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within 5 years after its rendition, on such terms as may be just; and if the defense be successful, and the judgment or any part thereof shall have been collected, or otherwise enforced, such restitution may thereupon be compelled as the Court may direct, but *title* to property sold under such judgment to a purchaser in good faith shall not be thereby affected."

As to the divorce proceedings and the order made therein allowing alimony, this section does not apply, and the proceedings being in all respects regular as above stated, the judgment therein rendered cannot be set aside. Besides, the title to the land was acquired by the plaintiff as a *bona fide* purchaser at the sale under execution, and cannot be disturbed. It will be noted, too, that when "good cause is shown" *before* judgment the defendant *must* be allowed to defend, but if after judgment, he *may* (except in divorce actions) be allowed to defend on just terms. The judge in this case imposed no terms.

As to the other action to declare the defendant a trustee of another tract of land because purchased by the defendant with money of the wife, but the husband, without her knowledge and contrary to their agreement, having taken title to the same in his own name, the proceedings were in every respect the same as in the action in regard to divorce and regular alimony. Service by publication was authorized under Rev., 442, subsec. 4, above set out. The proceedings to set the judgment aside were upon the same affidavits and findings as to the other case. As said in *Bernhardt v. Brown,* 118 N. C., 705, "Publication is authorized in those cases in which the court already has jurisdiction of the *res,* as to enforce some lien or a partition of property in its control or the

like, and the judgment has no personal force, not even for the costs, being limited to acting upon the property." It is further said, p. 706: "In proceedings under this class—proceedings *in rem*—it is not necessary, as in proceedings *quasi in rem,* to acquire jurisdiction by actual seizure or attachment of the property, but 'it may be done by the mere bringing of the suit in which the claim is sought to be enforced, which in law (in such cases) is equivalent to a seizure, being the open and public exercise of the dominion over it for the purpose of the suit.' *Heidritter v. Oil Co.,* 112 U. S., 294, and as to this class of cases the statute prescribes publication of the summons whether the defendant is a nonresident or resident, whenever, 'after due diligence, he cannot be found in the State.' The Code, sec. 218 (4); *Claflin v. Harrison,* 108 N. C., 157."

It is only in proceedings of the third class, *quasi in rem,* set out in *Bernhardt v. Brown, supra,* that an attachment is necessary as a basis of publication. In those cases it is not sought to deal with the property *in rem* because the Court already has jurisdiction of the *res,* located here, to enforce some lien or right claimed therein nor to enforce a judgment in divorce, but the court proceeds "to acquire jurisdiction by attaching property of a nonresident or of an absconding creditor, and in similar cases." *Bernhardt v. Brown, supra.*

The judgment in the second action to declare the defendant a trustee for his wife as to the other tract described in the complaint was regular in all respects. But the motion having been made within 5 years after the judgment rendered, the court below might allow the defendant to defend "upon good cause shown, and upon just terms." The jury in that case found upon the testimony the issues as follows:

"1. Were the lands described in the complaint, and all improvements thereon, paid for by plaintiff with her own money? Answer: 'Yes.'

"2. Were the deeds to said lands taken in the name of the defendant without the knowledge or consent of the plaintiff? Answer: 'Yes.'"

An examination of the affidavits filed by the defendant shows that he sets out as good cause that he has a "good and meritorious defense." This is merely his opinion, and was not sufficient to justify the finding of the judge. An inspection of the affidavit of the defendant shows that he relies upon the allegations that no attachments were issued, and in the divorce case that the facts were not found in the judgment allowing alimony. These were matters of law which the defendant erred in deeming sufficient to set aside the judgment. The judge added a finding, without any evidence to support it, and contrary to the evidence, that the defendant had no notice of the pendency of the action. The only other allegation set out in the defendant's affidavit as to this case is the following: "This affiant purchased all the real state deeded to him

in Mitchell County, North Carolina, with his own funds, the plaintiff, Mrs. White, never having furnished a dollar of the purchase money." His averment in both cases that his wife was crazy is contradicted by the judgment in the record rendered in a trial which he procured and attended, that she was sane.

In view of the fact that the defendant had notice of the pendency of the action, which he might have defended, and which he did attempt to compromise through his counsel and the verdict of the jury, presumably upon sufficient evidence, at July Term, 1914, upon the issues above set out, and the further fact that this motion to set aside such verdict and judgment was not made till 26 March, 1919, nearly 5 years later during which time, as the defendant's letters show, he knew that the plaintiff was in possession of the property, we do not think that there was sufficient evidence to justify the findings that good cause was shown, after the death of the wife, who was probably the only person who could have shown that, as the jury found, the land was bought with her money, and the title was taken in her husband's name, without her knowledge and consent, and the motion should have been denied.

To sum up:

1. The proceedings in both cases are regular in every respect.

2. No attachment in either case, nor any notice beyond publication, which was made, was necessary, but in fact upon the uncontradicted evidence the defendant did have full knowledge of the pendency of both actions before judgment, and opportunity to defend, and hence he cannot be allowed to defend even under Rev., 449; *Turner v. Machine Co.*, 133 N. C., 385-387.

3. Rev., 449, allowing, on good cause shown, the defendant to defend after judgment does not apply to actions for divorce, and, if it did, it could not require the return of alimony allowed for support of wife *pendente lite,* and collected.

4. Upon the facts in this case, there was "no good cause shown" to set aside the verdict, or the judgment in either case, after the lapse of nearly 5 years, the death of the wife and the loss thus of the evidence on which the judgments were rendered.

We think the present owner of the property, the Protestant Episcopal Church, as devisee of Mrs. White, should have been a party defendant.

In both cases, the order setting aside the judgment is

Reversed.

ALLEN, J., dissenting: The irregularities in this action are glaring and numerous, as I will undertake to demonstrate.

1. The attempted service of summons on the defendant is by publication, based on the following affidavit:

"M. L. Wilson, being duly sworn, says that he is one of the attorneys for the plaintiff, Mrs. Josephine Pope White, in the above entitled case; that the defendant herein cannot, after due diligence, be found in the State of North Carolina; that a cause of action exists against the defendant, and in favor of the plaintiff, for the purpose of obtaining a divorce *a mesna et thoro* and alimony."

This affidavit is fatally defective in that it fails to state any facts showing a cause of action in favor of the plaintiff.

In *Bacon v. Johnson,* 110 N. C., 116, the Court, in an opinion to which all agreed, said: "The service of the summons or notice as original process in the action by publication must be made strictly in accordance with the requirements of the statute. . . . The Court must see that every prerequisite prescribed exists in any particular case before it grants the order of publication. Otherwise, the publication will be unauthorized, irregular, and fatally defective, unless in some way such irregularity shall be waived or cured. *Spiers v. Halstead,* 71 N. C., 209; *Windley v. Bradway,* 77 N. C., 333; *Wheeler v. Cobb,* 75 N. C., 21; *Faulk v. Smith,* 84 N. C., 501.

"The statute cited above, among other things pertinent here, prescribes and requires that in order to obtain an order that service of notice of the action be made by publication, it must appear by affidavit 'that a cause of action (exists) against the defendant in respect to whom service is to be made. . . .' It is not sufficient to state generally that a cause of action exists against the defendants, or that they are necessary parties to the action. A brief summary of the facts constituting the cause of action, or of the facts showing that the parties are necessary parties to the action, should be stated so that the Court can see and determine that there exists a cause of action, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties sought to be made parties are necessary parties. It is the province and duty of the Court to see the facts and determine the legal question as to whether there is a cause of action or not."

This authority has been cited frequently, and has never been modified, and so long as it stands it must be held that the affidavit is fatally defective, and if so, the order for publication is void, and there has been no service on the defendant by publication or otherwise.

If this position is sound, the defendant was not required to take any notice of the issuing of the summons if he knew of it, and he is entitled to have the judgment set aside without regard to the merits.

"It is the clear right of every person to be heard before any action is invoked and had before a judicial tribunal, affecting his rights of person or property. If no opportunity has been offered, and such

prejudicial action has been taken, as well when he was never made a party as when by death he has ceased to be, in either case, the severance being equally effectual and absolute, the Court will at once, when judicially informed of the error, correct it, and relieve him and his estate from the wrong, not because injustice is done in the particular case, but because it may have been done, and the inflexible maxim *audi alteram* will be maintained. In such case the Court does not investigate the merits of the matter in dispute, but sets aside the judgment, and reopens the otherwise concluded matter, to afford the representative the opportunity, not open to his intestate, and which the law accords to all, of being heard in opposition." *Lynn v. Lowe,* 88 N. C., 482. Approved in *Card v. Finch,* 142 N. C., 145.

Certainly the rule should not be relaxed in a case like this where no right of an innocent purchaser has intervened and the affidavit is not made by a party, but by an attorney, who could only speak from hearsay, and was doubtless incorporating in his affidavit not facts but the opinion given to his client.

2. The notice of the action was published once a week for four weeks, beginning in February, so that publication was complete by the last of March, 1914, and the complaint was not verified until 14 April, 1914, more than two weeks after publication, and the statute, Rev., 442, subsec. 5, requires that "Where the action is for divorce, and in all cases where publication is made, the complaint must be filed before the expiration of the time of publication ordered."

3. The statute (Rev., 1566) requires the wife to file her complaint before applying for alimony, stating facts entitling her to the relief demanded, "which, upon application for alimony, shall be found by the judge to be true," and it was held in *Moore v. Moore,* 130 N. C., 336, that "the court below must find the facts."

Again, *Garsed v. Garsed,* 170 N. C., 673: "In *White v. White,* 84 N. C., 340; *McQueen v. McQueen,* 82 N. C., 471; *Ladd v. Ladd,* 121 N. C., 119; *Dowdy v. Dowdy,* 154 N. C., 558; *Page v. Page,* 161 N. C., 175, it is held that the complaint must aver, and facts must be found upon which it can be seen that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains."

None of these facts are found in the order for alimony, and the only finding made by the judge is that the plaintiff had received no support from the defendant since January, 1913.

4. The land of the defendant, worth more than $3,000, was sold under execution to pay $500, and bought by the plaintiff for the amount of her judgment when she had in her possession personal property of the defendant of the value of $1,300, in violation of the terms of the execu-

tion and of the provisions of the statute which required the judgment to be made first out of the personal estate.

These proceedings were had in the absence of the defendant, and when he had not been heard, and the plaintiff ought to be required to conform to the law.

In the action to have the defendant declared a trustee there was no service of the summons attempted except by publication, and the order of publication is based on an affidavit made by the same attorney as in the action for divorce, on the same day, and in the same language, and I therefore think for the reasons heretofore stated that there has been no service, and that the judgment is void, and that the defendant has the right to have it set aside.

In this action it is also found as a fact by the judge that the defendant has shown good cause for not moving earlier to set the judgment aside, and it is not contended that there is no evidence to support the finding. His motion is also made within the time prescribed by sec. 449 of the Revisal, which permits one to have a judgment set aside for good cause within twelve months after notice of the judgment, and within five years after its rendition, and I do not think we have the right to disturb a finding of fact made by the judge which is supported by evidence.

The two actions have some features that are peculiar, and if the defendant may be criticized for not making a defense if he knew that a summons had issued, it is strange that the plaintiff, although living four years after the action for divorce was commenced, has never insisted upon its trial, and it stands today without verdict or judgment sustaining the allegations of her complaint, indicating that the purpose of the action was not for a divorce, but to devise a way of transferring the title of the defendant in his lands to the plaintiff.

BROWN, J., concurs in this opinion.

BOARD OF COMMISSIONERS OF THE CITY OF HENDERSONVILLE v. C. N. MALONE & COMPANY.

(Filed 19 May, 1920.)

1. Municipal Corporations—Cities and Towns—Bonds—Elections—Ordinances—Publication—Irregularities.

The validity of municipal school bonds is not affected by the fact that the ordinance required that the validity of the resolution could only be questioned by action, etc., within thirty days from its *last* publication.

when the statute authorizing the ordinance requires that its validity could only be questioned within thirty days after its *first* publication, there being no statutory requirement making the manner of publication essential to the validity of the bonds, or mandatory, and it appears that the election called for was fairly held, giving the voters full opportunity, and it resulted in a large majority in favor of the bonds.

2. Municipal Corporations—Cities and Towns—Elections—Ordinances—Notice—Meetings.

The validity of a municipal election in favor of school bonds may not be successfully attacked on the ground that an ordinance authorizing the election had not a full attendance of the board when nearly all of the members were present, and all had notice of the meeting and its purpose.

3. Municipal corporations—Cities and Towns—Elections—School Bonds—Ordinances—Publication.

Where a municipal ordinance calling for an election to vote upon the question of the issuance of school bonds has been published but once in a newspaper of wide circulation among the voters, instead of once a week for four successive weeks, provided by the statute, the statute does not make the validity of the bonds to depend upon the longer or more extensive publication, and the failure of compliance therewith does not affect the validity of the bonds, when every qualified person has cast his vote thereon, and the issue sustained by a large majority of those voting, without challenge.

4. Elections— Ballots— Forms—Ordinances—Statutes—Directory Acts—Irregularities—Municipal Corporations—Cities and Towns.

There being no exact language essential to the validity of a ballot upon which the question of a proposed school bond issue shall be submitted to the voters at a municipal election under a city ordinance, the form of sec. 22, ch. 178, Laws 1919, known as the "Municipal Finance Act," "for the ordinance" or "against the ordinance" is directory and not mandatory, and a ballot with the words "for school bonds" or "against school bonds" is a substantial compliance therewith, and this departure alone will not affect the validity of the bonds issued accordingly.

5. Elections — Publishing Returns — Statutes — Irregularities — School Bonds.

Objection to the validity of the election, that the returns for and against an issue of school bonds had not been published as required by sec. 22, ch. 178, Laws 1919, may not be sustained, there being nothing in the act indicating that such publication was essential, it appearing that the books were kept open for the period required by law for registration, with full notice to the voters, and no prejudice sustained thereby.

APPEAL by defendant from *Webb, J.*, at chambers in Asheville, 10 April, 1920.

This was a controversy submitted without action, to determine the validity of $30,000 of school bonds issued by the town of Hendersonville, under an ordinance authorized by ch. 138, Laws 1917, as amended by ch. 178, Laws 1919, and known as the "Municipal Finance Act." The

defendants, who purchased said bonds on 20 October, 1919, now decline to pay for them upon the ground that they are not valid. From a judgment in favor of the plaintiff the defendants appealed.

E. W. Ewbank for plaintiff.
G. A. Thomasson and C. N. Malone for defendants.

CLARK, C. J. The first exception of the defendants to the validity of the bonds is that the ordinance under which they were issued provides: "Any action, or proceeding, questioning the validity of the resolution must be commenced within 30 days after its *last* publication," whereas, the statute authorizing the ordinances requires (sec. 20) that "Any action, or proceeding, questioning the validity of said ordinance must be commenced within 30 days after its first publication."

15 Cyc., 316, says: "It is the duty of the Court to sustain an election authorized by law if it has been conducted so as to give a free and fair expression of the popular will, and the actual result thereof is clearly ascertained. . . . In the absence of fraud, mere irregularities in the conduct of an election, where it does not appear that the result was affected either by the rejection of legal votes or the reception of illegal ones, will not justify the rejection of the whole vote of the precinct." In McCrary on Elections it is said: "If, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that the performance is essential to the validity of the election, then they will be regarded as mandatory if they affect the result, and directory if they do not."

There is nothing in this statute which makes the manner of publication essential to the validity of the election, and the provisions as to the notice are therefore directory and not mandatory. Besides, this action is not brought to question the validity of the resolution.

The second ground of exception is that the "ordinance was passed at a called meeting at which the full board was not present, such called meeting being an adjourned meeting." Sec. 29, ch. 352, Pr. Laws 1913 (the charter of Hendersonville), provides: "The commissioners shall meet in regular meeting at least once a month for the transaction of public business, and at such other times as they shall be called to meet by the mayor, to consider only such matters as shall be set forth in the call."

The record shows that all the members of the board had notice of the meeting and of its purpose, and that 5 out of 6 members of the board attended, and the mayor himself presided at the meeting when the ordinance was adopted.

The third ground of exception is: "Said ordinance of 12 August, 1919, was published only one time, *i. e.*, on 14 August, 1919, whereas, the Municipal Finance Act, sec. 20, required that it should be 'published once in each four successive weeks after its final passage.'"

The statute, however, does not make publication for four successive weeks essential to the validity of the election, and it appears that the ordinance was published in full in the *Hendersonville News* (a paper of large and general circulation in the town), and it further appears that at the election every qualified voter in the town voted upon the proposition, and it was sustained by a large majority of those voting—no elector entitled to vote was rejected, and none not entitled to vote cast a ballot.

The fourth ground of exception is that the ballot used in said election carried the words, "For School Bonds" or "Against School Bonds," whereas, sec. 22 of the statute provided the ballot should contain the words "For the Ordinance" or "Against the Ordinance." There being nothing in the statute making the exact language essential to the validity of the ballot, and the words used carrying practically the same meaning the requirement was directory and not mandatory, and we think a substantial compliance, upon the facts agreed, as every elector voted.

The last exception is that the registrar and the judge of said election appointed by the resolution of 12 August having resigned 3 September, another registrar and judge of election were appointed in their stead. This not infrequently happens. The appointment of the registrar and judge of election who acted was duly posted. The names of the original appointees were not posted, and there is no evidence that there was any damage caused, or that any elector was misled.

There is also objection that election returns for and against the school bond ordinance was not published as required by sec. 22 of the act, but there is nothing that indicates that such publication was essential to the validity of the election, or that any prejudice has been sustained thereby. The books were kept open for the period required by law for registration, and the voters had the fullest notice, for they all voted.

In *Hill v. Skinner,* 169 N. C., 408, it is said: "While, so far as the officers are concerned who are charged with the duty of giving notice, the requirement as to notice is imperative, yet it will be regarded, otherwise, as directory, if the result would not be changed by a departure from the provisions of the statute. The law looks more to the substance than to the form, and if it appears that a clear majority of the qualified voters have cast their votes in favor of the proposition submitted to them, and that there has been a fair and full opportunity for all to vote, and that there has been no fraud, and the election is in all respects free from taint of any sort, so that no well founded suspicion can be cast

upon it, it would be idle to say that this free and untrammeled expression of the popular will should be disregarded and set aside." . . . "If a set of men do that, in the same way and with the same effect, which they could have done if there had been notice to do it, and there would be no essential difference in the result with or without notice, the law attaches less importance to the giving of notice under such cirstances, and will not invalidate the result." To the same purport are McCrary on Elections (3 ed.), sec. 190; *Younts v. Comrs.,* 151 N. C., 582; *Hendersonville v. Jordan,* 150 N. C., 35; *Rodwell v. Rowland,* 137 N. C., 633; *Claybrook v. Comrs.,* 117 N. C., 458; *R. R. v. Comrs.,* 116 N. C., 563; *DeBerry v. Nicholson,* 102 N. C., 465; *Deloatch v. Rogers,* 86 N. C., 357.

The requirements of the statute should have been complied with, but when, as here, the failure to do so is in matters directory only, and has not prejudiced the result of the election, the irregularity will not vitiate the election. 10 A. and E., 756.

Affirmed.

GEORGE L. FORESTER v. ANSON G. BETTS ET AL.

(Filed 19 May, 1920.)

(For digest, see *Harris v. Turner, ante.*)

CIVIL ACTION, tried before *Finley, J.*, and a jury, at December Term, 1919, of BUNCOMBE.

Plaintiff sued for a breach of a contract by which the defendant agreed to employ him in his service, as traffic manager, from 18 March, 1918, to 18 March, 1919, at $250 per month from 1 May, 1918, another arrangement having been made as to the months of March and April. There is a provision in the contract that it can be terminated by either party on 90 days notice. Plaintiff entered upon the performance of his duties, and on 4 November, 1918, the defendant notified the plaintiff that he had decided to put an end to the contract, and that plaintiff must quit the service immediately. Plaintiff alleged that defendant had wrongfully terminated the contract by ignoring and repudiating the provision as to notice, and in other respects, and further averring that he was ready, able, and willing to perform his part of the same in every respect. Defendant denied the allegation, and pleaded that during the ninety days plaintiff had earned $400 in other occupations, for which he claimed credit. Plaintiff also alleged other services performed at defendant's special request, for which he claimed $5,000 as compensation. The court submitted two issues, which, with the answer of the jury, are as follows:

"1. Is the defendant, Anson G. Betts, indebted to the plaintiff, Geo. L. Forester, under the written contract for salary, and, if so, in what amount? Answer: 'Yes; in the sum of $718.30.'

"2. Is the defendant, Anson G. Betts, indebted to the plaintiff, Geo. L. Forester, on the special contract, as alleged in the complaint, and if so, in what amount? Answer: 'No.'"

Judgment on the verdict, and defendant appealed.

Plaintiff not represented in this Court.
Stevens & Anderson for defendant.

WALKER, J., after stating the case: There was evidence to support the verdict, and the question raised upon the pleadings and the evidence was purely one of fact. There was clearly no error in the charge. The judge fairly and fully presented every phase of the case, including the right of the defendant to the credit of $400.00. Whether the credit should have been allowed was solely for the jury upon the evidence and, in this respect, the case is not, in principle, unlike that of *Harris v. Turner,* decided at this term, *ante,* 322, where it was held:

1. Jurors are not bound to accept as true all the testimony offered by the plaintiff or the defendant, but can accept a part and reject the remainder, being the sole judges of the testimony and what it tends to prove, including the credibility of witnesses.

2. If a party desires fuller or more specific instructions than those given by the court, he must ask for them, and not wait until the verdict has gone against him and then for the first time complain that an error was committed.

3. No matter how strongly the evidence supports the contention of one party, the court cannot, in view of Revisal 1905, sec. 535, forbidding the judge to give an opinion upon the facts, instruct the jury to answer a question of fact in a particular way; such party's remedy being a request to the court that the verdict be set aside as being against the weight of the evidence.

4. Decision of trial court, setting aside a verdict as being against the weight of the evidence, is not reviewable.

Referring specially to the assignments of error: The judge did give substantially the instructions which defendant alleges, in his first assignment, that he did not give, as to the credit to which the defendant was entitled. He could not properly have charged, that the defendant should have a deduction of four hundred dollars, as that would have been an expression of opinion upon the evidence and a palpable violation of the act of 1796 (Revisal of 1905, sec. 535; Pell's Revisal, vol. 1, p. 259, sec. 535, and note). The motion to set aside the verdict as be-

ing contrary to the weight of the evidence was addressed to the sound discretion of the judge and is not reviewable here. Revisal, sec. 554, sub-sec. 4; *Jarrett v. Trunk Co.*, 142 N. C., 466; Pell's Revisal, vol. 1, p. 284 and cases; *Harris v. Turner, supra,* which so fully and completely covers the points raised in the record as to render further discussion unnecessary.

It appears that the case was very ably and successfully managed by defendant's counsel below. Plaintiff claimed damages to the amount of $7,886.13 and recovered of this amount only $718.30, and it would seem that he should be asking for another trial, and not the defendant.

No error.

HIGHWAY COMMISSION OF WOODSDALE TOWNSHIP v. CENTRAL HIGHWAY COMMISSION.

(Filed 2 June, 1920.)

1. Highways—Actions—Commissioners—Parties—Statutes.

In an action to determine whether the Highway Commission of a township or the Central Highway Commission of Person County, under ch. 74, Public Local Laws of 1917, have the right and power to locate a township road, the individual members of the commission as parties is surplusage and immaterial.

2. Highways—Statutes—Township Commission—Central Commission—Relative Duties.

Under the provisions of ch. 74, Public Local Laws of 1917, secs. 7 and 12, that the Central High Commission of Person County shall make rules and regulations necessary for the control and management of the public roads of the county, and invested with authority to construct, improve and maintain them, etc., and "to exercise all other rights and powers for the control and management as may now be vested in the Board of County Commissioners in that county"; and, also, that the Township Highway Commission, under the general rules and regulations prescribed by the Central Commission, shall "have charge of the management of the laying out, constructing, altering and repairing and building of the public roads of the several townships; provided all the roads shall be laid out and constructed under the supervision of a competent and expert road engineer acceptable to the Central Highway Commission"; *Held*, the township commission was given the exclusive power to lay out the roads in the respective townships.

APPEAL by both parties from *Calvert, J.*, at chambers in Hillsboro, 3 May, 1920.

This is an action begun 8 April, 1920, by the highway commissioners of Woodsdale Township in Person County against the Central Highway

Commission of Person County, to restrain them from building a road in Woodsdale Township. The object of the action is to determine, under the provisions of ch. 74, Public-Local Laws 1917, whether the township commission or the county commission have the right and power to locate the road to be constructed in the township under the provisions of said act.

At the hearing before *Calvert, J.,* at chambers in Hillsboro 3 May, 1920, he refused a *mandamus* to require the county highway commission to build the road designated by the plaintiff, but restrained the defendant from using any of the money allotted to Woodsdale Township in the construction of the Chub Lake Road, or any other road in said township, and ordered the Central Highway Commission of Person County to adopt rules and regulations for the laying out of roads by the highway commissioners of the several townships of the county, such roads to be constructed by the Central Highway Commission. The defendant appealed from that part of his Honor's order enjoining the construction of the Chub Lake Road, and directing the making and promulgation of general rules and regulations. The plaintiff appealed from that part of the order declining to issue a *mandamus* compelling the construction of the road designated by the township highway commission.

C. A. Hall, S. C. Brawley, and R. O. Everett for plaintiff.
Fuller, Reade & Fuller and F. O. Carver for defendant.

CLARK, C. J. The commissioners of both the township and county commission are made parties individually. This at most is surplusage, and immaterial.

This action is to obtain a construction of ch. 74, Public-Local Laws 1917, which authorized the commissioners of Person County to submit to the voters the question of issuing bonds to build and improve public roads. The validity of this act was before us, and sustained in *Wagstaff v. Commission,* 177 N. C., 354. Sec. 4 of said chapter provides that at the time of submitting the question of issuing bonds to the electorate there should be elected in each township three persons as township highway commissioners.

Sec. 5 provides that if the majority of the votes cast are in favor of issuing the bonds the township highway commissioners from the 9 townships in the county should meet and elect three persons as the Central Highway Commission of Person County. The bond issue was approved by the voters of the county in March, 1917, and thereafter, as directed by the act, the township highway commissioners elected the defendants, the Central Highway Commission of Person County.

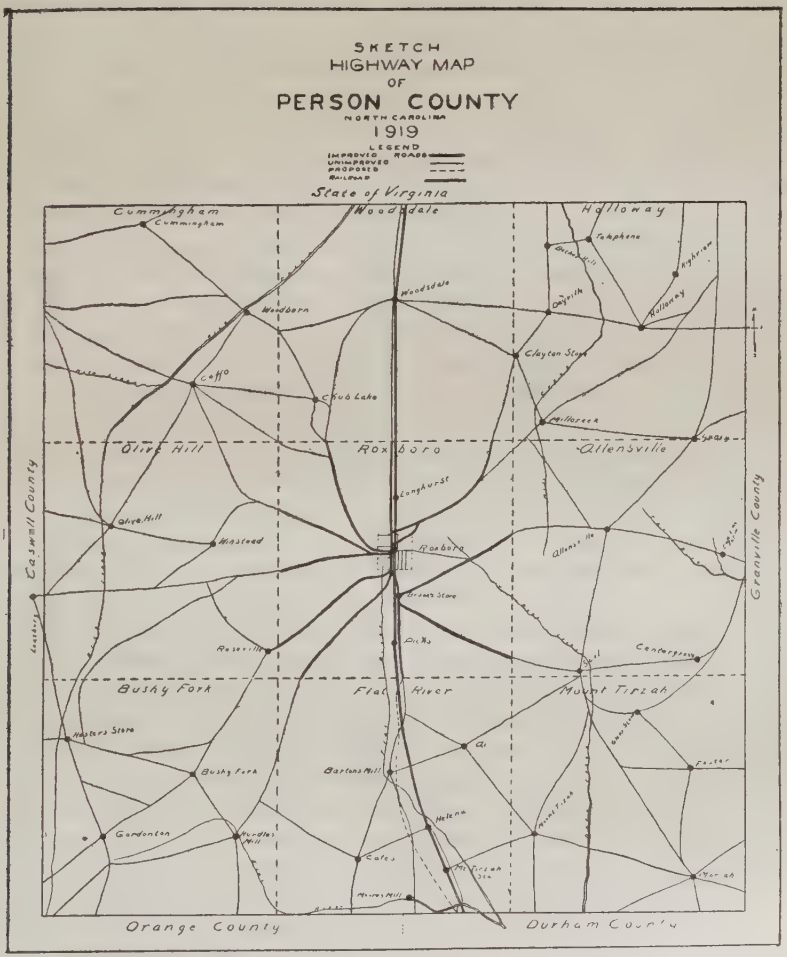
The bond issue authorized was $300,000—$25,000 of which was to be apportioned to, and spent in each of the 9 townships of the county, and the remaining $75,000 was to be used in the retirement of Roxboro Township bonds which had been issued by virtue of ch. 449, Public-Local Laws 1915.

Sec. 7, ch. 74, aforesaid, authorizes the Central Highway Commission to "sue and be sued," to make contracts, to acquire property, to exercise such other rights and privileges as are incident to the powers conferred, to construct, improve, and maintain the public roads of the county, buy, or rent teams, machinery and implements as may be necessary, and have all other rights and powers "for control and management" as were then vested in the county commissioners of Person County, and made it the duty of the Central Highway Commission to make general rules and regulations for *laying out,* constructing, altering, repairing, and building public roads in the several townships by the township highway commissioners; and that the latter shall, under the general rules and regulations prescribed by the Central Highway Commission, have charge of and management of the *laying out,* constructing, altering, repairing, and building of the public roads of the several townships of Person County. Provided all roads shall be laid out and constructed under the supervision of a competent and expert road engineer acceptable to the Central Highway Commission.

It was admitted at the hearing that the defendant, the Central Highway Commission, had not made and promulgated general rules and regulations for laying out public roads, as prescribed in sec. 7, but had themselves laid out and begun the construction of public roads in the several townships, paying for same out of the funds apportioned to each township without having consulted the township highway commissioners. In the fall of 1919 the Central Highway Commission laid out the Chub Lake Road running through the southwestern portion of Woodsdale Township, and in April, 1920, began the building of said road, to be paid for out of the $25,000 allotted to Woodsdale Township. The highway commissioners of said township protested in the fall of 1919 against the construction of the Chub Lake Road, but the Central Highway Commission began its construction in April, 1920. The Woodsdale Township highway commissioners, at a regular meeting in the spring of 1920, designated by resolution the road which they desired constructed in that township, and notified the Central Commission, which, however, ignored such resolution and began the construction of the said Lake Road.

The road designated by the township highway commission runs east and west from Daysville on the central highway to Woodsdale on the Norfolk & Western Railroad in the center of said township, a distance of nearly three miles, and thence northwestwardly to Cunningham,

through the center of the township and connecting with the central highway and said railroad station. The said central highway runs north and south through the central part of Person County. On said central highway, near where it intersects with this road, is the $40,000 high school building.



It is alleged that 80 per cent of the people of Woodsdale Township petitioned that the road be laid out as above stated, which runs through a section thickly populated by small farmers. Person County is rectangular in shape, having 9 townships—3 in the southern part, 3 in the center, and 3 in the northern part. The Norfolk & Western Railroad runs north and south through the center of the county. Helena

is a railroad station in the southern part of the county, and used by the people of the three lower townships. Roxboro is a railroad station used by the people of the three central townships, and Woodsdale is the railroad station used by the people in the three northern townships—Holloway, Woodsdale, and Cunningham. The three said railroad stations thus each serve the three said sections of the county, and the road selected by the highway commissioners of Woodsdale will be used by the people of each of the three northern townships in going to the railroad station connecting with the central highway and the high school.

It is alleged that the Central Highway Commission is undertaking to have all the roads radiate from Roxboro in preference to the roads running east and west. This, it seems, will isolate the northern and southern parts of the county from their railroad stations, and force the business to Roxboro, and will seriously hamper also the convenience of the schools. There are other objections made to the alleged greater expense and inconvenience of selecting the Chub Lake Road, which the Central Highway Commission has designated to be built out of the $25,000 appropriated to Woodsdale Township.

The controversy is whether the Central Highway Commission or the township highway commissioners, under the proper construction of the act, shall choose and lay out the roads to be worked and maintained in the respective townships.

This question is not without difficulty, but looking at it as a whole, in order to determine the legislative intent, it seems to us that the intention of the act is that the township commissioners shall designate what roads in their respective townships should be laid out, because they are presumed to be most conversant with the wishes and needs of their respective townships, as a measure of local self-government, but to the Central Highway Commission is committed the supervision of the construction and maintenance of the roads thus located by the township commissioners as to the manner in which they shall be built, the purchase of the machinery, team, and other agencies for the construction of said road, and in every respect as to control and management. The location of the roads is the only matter committed to the township commissioners not subject to the supervision of the central commission.

The language of the act bears this as the most reasonable construction, and indeed, if it is not the true construction there seems to be no reason whatever for the creation of the township highway commissioners for the general supervision of the construction and maintenance is remitted to the central commission in order, doubtless, to make the construction and control uniform throughout the county.

It is suggested that if this were done, the roads selected by the township commissioners might not connect with the roads of the adjoining

townships. But read in the light of the geographical situation above stated, each tier of townships is interested in having the roads run east and west to connect with the railroad stations in that tier, and to connect up with their public schools. It is charged that the Central Highway Commission wishes to have the roads run north and south, forcing business to Roxboro as the county center, and that this would cut off the people in the other townships from their natural outlet at the nearest railroad station. However this may be, it would seem that the act, as we read it, was intended to authorize the highway commissioners of each township to lay out their own roads, which are then to be constructed under the rules and regulations prescribed by the Central Highway Commission.

This construction is peculiarly appropriate, and the natural construction. It is in line with the State regulation under which each county locates its roads, which are to be constructed under rules and regulations and under the general supervision of the State Highway Commission, and where the United States Government has appropriated funds for road construction the roads adopted are located by the State, but the construction, so far as affects appropriations from the Federal Government, is under rules and regulations prescribed by the general Government.

Sec. 7 of this act provides that the Central Highway Commission shall provide such rules and regulations as may be necessary for the "control and management of the public roads of Person County, which is invested with authority to construct, improve, and maintain the public roads of the county, and shall purchase or hire the teams, machinery, and implements, and fix the compensation of the employees, and exercise all other rights and powers *for the control and management* as may now be vested in the board of county commissioners in that county." This transfers to the Central Highway Commission the authority of the county commissioners over the roads only to that extent.

Sec. 12 provides that the Central Highway Commission shall adopt general rules and regulations for "opening, constructing, laying out, improving, changing, altering, or repairing the public roads of the county, and for working or improving the same." This section does not give the said Central Highway Commission the authority to lay out, *i. e.*, to locate the said road, but merely to provide the general rules and regulations for such purpose.

Sec. 7 provides that said township highway commissioners shall, under such general rules and regulations prescribed by the Central Highway Commission, "have charge of and management of the laying out (*i. e.*, locating) constructing, altering, repairing, and building the public roads of the several townships; *provided* all the roads shall be laid out and

constructed under the supervision of a competent and expert road engineer acceptable to the Central Highway Commission."

There seems to be no doubt that as to the real point in controversy here, that the laying out, *i. e.,* the location of the roads to be worked, is left with the township highway commissioners, but that the roads are to be constructed and repaired under the rules and regulations, and under the general supervision of the Central Highway Commission. It is true that both the central and township commissioners are vested with authority to construct, but the construction by the latter is evidently to be under the general supervision of the Central Highway Commission.

We think the correct construction of the act cannot be better stated than in the plaintiff's brief as follows: "The township highway commissioners have the authority to designate and lay out the roads in their respective townships to be built out of the amount apportioned to them arising from the issue of bonds, *i. e.,* $25,000, and the Central Highway Commission has the general authority to construct the roads after they have been designated and laid out by the township highway commissioners. This removes all conflict in the statute. Both bodies are given the right to construct roads, but only the township highway commissioners are given the authority to lay out the roads. The only power that the Central Highway Commission has with respect thereto is the adoption of general rules and regulations guiding the township highway commissioners in laying out the roads. This construction reconciles all apparent conflicts, and gives effect to every part of the statute, and effectuates the intent of the Legislature." This construction seems to be in accordance with the geographical situation above recited. And also with the history of road legislation in Person County. Laws 1913, ch. 268, when submitted to the voters of Person County, was not approved by them, and on inspection of that statute we find no authority therein given to the township commissioners to control the laying out of the roads in their respective townships, and it is probable, as suggested, that this was the cause that the act was not approved at the ballot box; ch. 449, Laws 1915, was then submitted, which was applicable only to Roxboro Township. Then when the act of 1917 was passed giving the township highway commissioners in each township the right to lay out the roads, and refunding to Roxboro Township $75,000 it had voted, the act was approved by the popular vote.

The defendants contend that this act gives to the Central Highway Commission the same authority over the roads of the county "as were then vested in the county commissioners." But this was qualified by the words immediately preceding: "and the Central Highway Commission shall have all other rights and powers *for the control and manage-*

ment (of said roads) as may now be vested in the board of county commissioners of Person County."

As already said, the Federal Government, in the appropriation for roads, leaves to the State the designation of the highways within the States. The State authorities leave to the counties the designation of the highways in each county, and this act evidently intends that the county commissioners of Person County should leave to the township highway commissioners the location of the roads in their townships. This construction also will prevent the complaints that have some time been made that county commissioners locate the roads most convenient or advantageous for their own sections of the county. This act empowers the township of Woodsdale, if it so chooses, to select an east and west road connecting up the different parts of the township with the railroad station in the center, whereas, the Chub Lake Road selected by the Central Highway Commission, aside from the objections urged on account of great expense, etc., would open up merely one corner of the township with Roxboro. It seems to us the intent of this act was to give each township the right to select and locate the roads in the township according to the will of the people therein, the entire county system to be under the control and management, both in construction and maintenance, of the Central Highway Commission.

The judgment below will be entered in accordance with this opinion, and to that extent the judgment below is

Affirmed.

BOARD OF TRUSTEES OF PLYMOUTH GRADED SCHOOL DISTRICT v. PRUDEN AND COMPANY.

(Filed 2 June, 1920.)

1. School Districts— Schools—Buildings—Equipment—Statutes—Bonds.

Legislative authority to a school district to issue bonds to erect a school building or buildings for the accommodation of the public schools therein, includes the power to provide the ordinary equipment. *Commissioners v. Malone*, 179, N. C., 110.

2. Same—Taxation—Interest—Sinking Fund.

Where a statute authorizes a school district to issue bonds to erect a school building or buildings, with provision for a special tax to pay the interest thereon "and to create a sinking fund sufficient to retire said bonds at their maturity," the provisions of the statute would control those of an ordinance limiting the amount, assuredly if the bonds were in the hands of an innocent purchaser for value; and were it otherwise, the validity of the bonds would not be affected under the principle applied in *Commissioners v. McDonald*, 148 N. C., 125.

CIVIL ACTION, heard on case agreed before *Lyon, J.*, at Spring Term, 1920, of WASHINGTON.

It appears from the facts properly presented that pursuant to an act passed for the purpose in reference to Plymouth Graded School District, ch. 128, Laws 1919, an election was held on 8 July, 1919, and the votes of said district by a large majority approved the proposition to issue coupon bonds to the amount of $60,000, to provide a fund for the erection of a school building for the accommodation of the public schools of said district, the said majority vote having been expressed on a ballot "for school bonds and taxes," as the statute directs.

In reference to the taxes to be levied to carry out this measure, the act provides in sec. 1, "that the proposition to be submitted shall be for the issue of $60,000 of bonds for the purpose designated, and for the levying of a tax sufficient to retire said bonds." And again, in sec. 8, "That if in the election provided for in the act the majority of the qualified voters of the district shall have voted for school bonds and taxes, and said bonds shall have been issued and sold, the board of commissioners is hereby authorized and directed to levy annually upon the property and polls of the district a special tax sufficient to provide for the payment of the interest on said bonds, and to create a sinking fund sufficient to retire said bonds at their maturity." The bonds having been prepared, the defendants agreed to purchase the same at a stipulated price, and now resist payment on the grounds:

1. That in the resolution of the county commissioners ordering the election it is provided that the proceeds of the bonds are to be used for the equipment as well as the erection of the buildings.

2. That in said resolution it is provided that the maximum annual tax for the payment of the interest and final retirement of said bonds shall be 75 cents on property, and $2.25 on the poll.

It further appears in the case agreed that according to the valuation of property in Plymouth Graded School District now prevailing the maximum tax is more than sufficient to meet the annual interest and retire the bonds at maturity as the statute contemplates and provides.

On these the facts chiefly relevant, there was judgment for plaintiff, and defendant excepted and appealed.

Zeb Vance Norman for plaintiff.
Van B. Martin for defendant.

HOKE, J., after stating the facts: The power to erect a school building or buildings for the accommodation of the public schools of a given district in our opinion includes the power to provide the ordinary equipment. As indicated in a recent decision of this Court, this equipment

consists in great part of seats and desks for the pupils, fastened to the building after the manner of fixtures, and comes clearly within the terms and purport of such a law as ordinarily expressed, and the first objection of the defendant has been properly disallowed. *Comrs. v. Malone, ante,* 10.

In reference to the second objection raised by the defendant, we are inclined to the opinion that the proceedings having been instituted, and the bond issue approved under the provisions of the statute specially applicable, that the provisions of the statute would be controlling, and the commissioners at all times empowered to levy a tax sufficient to pay the interest annually and retain the bonds at maturity—assuredly so if the bonds are held by an innocent purchaser for value. *Comrs. v. Malone, supra.*

The question, however, is not presented in the record, for even if the limitation in the amount of taxation contained in the resolution of the commissioners should be held effective, it would in no wise affect the validity of the bonds, under the principle applied by the Court in *Comrs. v. McDonald,* 148 N. C., 125.

We therefore concur in the ruling of his Honor that the proposed bond issue will constitute a binding obligation on the school district, and that the defendants must comply with the contract concerning them.

There is no error, and the judgment of the lower court is

Affirmed.

H. B. LAMB v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 June, 1920.)

1. Carriers of Goods— Commerce— Federal Employer's Liability Act— Federal Decisions—Procedure—Employer and Employee—Master and Servant.

In an action against a common carrier by rail brought in the courts of the State under the Federal Employer's Liability Act, the question of substantive liability must be determined according to the provisions of the Federal Statute when applicable and authoritative federal decisions construing the same, and the State regulations and rulings as to procedure will control except where the Federal statute makes provision to the contrary.

2. Negligence— Evidence— Circumstantial Evidence— Conjecture— Reasonable Probability—Federal Employer's Liability Act—Employer and Employee—Master and Servant.

In an action against the carrier brought under the provisions of the Federal Employer's Liability Act, both under our State and Federal decisions, the carrier's negligence, upon which its liability depends, must

be shown by affirmative proof, and that it was the proximate cause of the plaintiff's injuries, but this negligence may be established by circumstantial evidence when the relevant facts so shown are of such significance as to remove the case from the realm of conjecture and permit the inference of negligence as the more reasonable probability.

3. Carriers of Goods— Employer and Employee— Master and Servant— Negligence—Dangerous Employment—Freight Trains.

In both Federal and State jurisdictions, railroad companies in the operation of their freight trains are held to a high standard of care reasonably commensurate with the risks and dangers attendant upon the work, and although negligence may not be inferred from the ordinary jolts and jars incident to their operation, it may be imputed from a sudden, unusual and unnecessary stopping of such trains, that are likely to and do result in serious and substantial injuries to employees or passengers thereon.

4. Employer and Employee— Master and Servant— Federal Employer's Liability Act—Commerce—Fellow Servant—Negligence.

The Federal Employer's Liability Act, in suits coming under its provisions, abolishes the fellow servant doctrine by which an employer is relieved from liability for injuries due solely to the negligence of the fellow servant, and places such negligence on the same basis as if it had been the negligence of the employer.

5. Evidence—Nonsuit—Federal Court.

Under the rule of procedure, both in the State and Federal Courts, applicable to a motion of involuntary nonsuit is considered as equivalent to a demurrer to the evidence, and the facts making in favor of plaintiff's cause of action, whether appearing in plaintiff's or defendant's evidence, must be taken as true and construed in the aspect most favorable to him.

6. Pleadings—Demurrer—Evidence— Nonsuit— Appeal and Error— Objections and Exceptions.

Where the defendant has not demurred to the complaint or moved to make the allegations more definite, and proceeds with the trial upon evidence on a determinative issue, an objection to the complaint on the ground that its allegations failed to make out a case of actionable negligence is waived, and a motion for nonsuit must be considered and determined on the evidence relevant to the issue.

7. Evidence—Demurrer—Employer and Employee—Master and Servant —Federal Employer's Liability Act.

In plaintiff's, an employee's, action, brought under the Federal Employer's Liability Act, for damages for an injury he alleged he had received, and caused by the defendant's negligence, evidence is sufficient for the determination of the jury which tends to show that while the plaintiff was engaged in the scope of his employment in interstate commerce, the freight train, with which his occupation was connected, without warning or signal and without necessity, came from a ten mile speed to an unanticipated and sudden stop and complete stop, causing a violent jolt sufficient to knock plaintiff down, and render him for a time partially unconscious, and causing him serious and painful injuries, and a motion to nonsuit thereon is properly denied.

8. Same—Res Ipsa Loquitur—Instructions—Demurrer.

Semble, the Federal decisions applicable in that jurisdiction that the doctrine of *res ipsa loquitur* does not apply in action between employer and employee will not be followed under the Federal Employer's Liability Act and in cases controlled by its provisions, but, *Held*, its application will not be held for error in such cases where the trial judge merely refers to the doctrine as affording a circumstance which required the issue to be submitted to the jury, no specific objection is made to the charge on that account, and objection is only raised on motion to nonsuit upon the evidence, whereon the occurrence itself, and all the accompanying facts and circumstances offered in evidence which tend to establish the liability, require that they be given consideration.

9. Same—Assumption of Risks.

While the doctrine of assumption of risks in an action by an employee under the Federal Employer's Liability Act, is expressly recognized by the statute, the principle does not apply to the instant and unexpected negligence of the employer under circumstances which afford the employee no opportunity to know the conditions that threaten, or to appreciate the risks.

CIVIL ACTION, tried before *Allen, J.*, and a jury, at October Term, 1919, of NEW HANOVER.

The action is by an employee engaged in interstate commerce, and on duty at the time of the occurrence, to recover damages for personal injuries caused by the alleged negligence of defendant company, chiefly in the sudden, unusual, violent, and negligent stopping of a freight train by defendant company or its agents and employees whereby plaintiff received serious and painful physical injury from which he still suffers, etc.

There was denial of liability on the part of defendant—pleas of contributory neligence, assumption of risk—evidence offered by the parties to sustain their respective positions, and on issues submitted the jury rendered the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff assume the risk and danger of such injury? Answer: 'No.'

"3. Did the plaintiff, of his own negligence, contribute to his injury, as alleged in the complaint? Answer: 'No.'

"4. What damages, if any, is plaintiff entitled to recover? Answer: '$7,500.'"

The court having reduced this verdict to $3,500 damages, "plaintiff's counsel consenting thereto," there was judgment for said sum of $3,500, and defendant excepted and appealed, assigning for error the refusal to sustain defendant's motion for nonsuit.

Wright & Stevens for plaintiff.
Rountree & Davis for defendant.

HOKE, J. The action is brought under the Federal Employer's Liability Act, and this being true, the question of substantive liability must be determined according to "its provisions applicable, and authoritative Federal decisions construing the same." *Jones v. R. R.,* 176 N. C., 260-264, citing *Belch v. R. R.,* 176 N. C., 22; *Erie R. R. v. Winfield,* 244 U. S., 170; *N. Y. Central v. Winfield,* 244 U. S., 147; *St. Louis, etc., R. R. v. Hesterly, Admr.,* 228 U. S., 702; Second Employers' Liability Cases, 223 U. S., p. 1.

And the action having been instituted in the State Court, the State regulations and rulings as to procedure will control except where the Federal statute makes provision to the contrary; *Belch v. R. R.*, 176 N. C., 22, and authorities cited, among others, *Banserman v. Blunt,* 147 U. S., 647; *Quinette v. Pullman Co.,* 229 Fed., 333, and see, also, *Fleming v. R. R.,* 160 N. C., 196; *Horton v. R. R.,* 169 N. C., 116, opinion by *Associate Justice Walker.* Considering the record in view of these positions, and on the principal issue as to liability, that of defendant's negligence, it is held in both Federal and State decisions that there must be affirmative proof of negligence of the defendant, the proximate cause of plaintiff's injuries, and while this negligence may be established by circumstantial evidence, the relevant facts must be of such significance as to remove the case from the realm of conjecture and permit the inference of negligence as the more reasonable probability. *New Orleans, etc., R. R. v. Harris, Admr.,* 247 U. S., 367; *Sweeney v. Erving,* 228 U. S., 233; *Looney v. R. R.,* 200 U. S., 480; *Ridge v. R. R.,* 167 N. C., 510; *Fitzgerald v. R. R.,* 141 N. C., 530.

The principle referred to and applied in these and other decisions of like import is stated in *Fitzgerald's case,* as follows: "Direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the cause cannot be withdrawn from the jury, though the probability of accident may arise on the evidence."

Again, it is recognized in both jurisdictions that railroad companies in the operation of their freight trains are held to a high standard of care reasonably commensurate with the risks and dangers usually attendant upon the work, and although negligence may not be inferred from the ordinary jolts and jars incident to their operation, it may be imputed where there has been a "sudden, unusual, and unnecessary stopping of such trains, likely to and which do result in serious and substantial injuries to employees or passengers thereon." *Texas Pacific Ry. v.*

Behymer, 189 U. S., 469; *Texas Ry. v. Archibald,* 170 U. S., 665-673; *Indianapolis, etc., Ry. v. Horst,* 93 U. S., 291; *Jones v. R. R.,* 176 N. C., 260; *Ridge v. R. R.,* 167 N. C., 510; *Suttle v. R. R.,* 150 N. C., 668; *Marable v. R. R.,* 142 N. C., 557; *Cin. N. O. & T. P. Ry. v. Evans. Admr.,* 129 Ky., 152.

Further, the authoritative cases construing the statute are to the effect that as to suits coming under its provisions it abolishes the fellow-servant doctrine by which an employer is relieved from liability for injuries due solely to the negligence of the fellow-servant, and places such negligence "on the same basis as if it had been the negligence of the employer himself," thereby removing much of the uncertainty which had led the courts in many instances to rule that the facts in evidence tending to establish negligence were too conjectural to permit that the issue of liability be submitted to the jury. *Chesapeake & Ohio Valley Ry. v. D. C. Atley,* 241 U. S., 311, and cases cited.

And in reference to the rule of procedure applicable, it is uniformly held in this State that on a motion for involuntary nonsuit, considered with us as equivalent to a demurrer to the evidence, the facts making in favor of plaintiff's cause of action whether appearing in plaintiff's or defendant's evidence, must be taken as true, and construed in the aspect most favorable to him. *Aman v. Lumber Co.,* 160 N. C., 369; *Dail v. Taylor,* 151 N. C., 285; *Biles v. R. R.,* 143 N. C., 78; a position that prevails also in the Federal practice. *Chinoweth v. Haskell,* 3 Peters, 92; *Pawling v. U. S.,* 4 Cranch, 219.

In this connection it is contended for defendant that plaintiff has not in his complaint alleged facts sufficient to make out a case of actionable negligence, and therefore defendant's motion for nonsuit should have been allowed. On this question we think the allegations of the complaint in sections 3 and 4, taken in connection with the averments as to negligence, and the conditions and nature of the stopping complained of in section 9, are ample to set forth a cause of action, and if it were otherwise, defendant not having demurred to the complaint or moved to make the allegations more definite, but proceed to trial on a determinative issue, any objection to the complaint on the ground suggested is thereby waived, and in motion for nonsuit must be considered and determined on the evidence relevant to the issue. *Bennett v. Tel. Co.,* 128 N. C., 103; *Allen v. R. R.,* 120 N. C., 548; *Whitley v. R. R.,* 119 N. C., 724.

A proper application of these principles to the facts presented are, we think, in full support of his Honor's decision denying defendant's motion for involuntary nonsuit, it appearing from the plaintiff's testimony that a freight train, without warning or signal, and without necessity, so far as appears, came from a 10-mile speed to a sudden and

complete stop, causing a violent jolt sufficient to knock plaintiff down while he was engaged in the ordinary performance of his duties, and rendering him for a time partially unconscious, and causing him serious and painful physical injuries. Among other things, plaintiff, a witness in his own behalf, testified as to being knocked down, and said: "I was accustomed to the usual and ordinary stopping of freight trains. There was enough difference in this and the usual stop to throw me down on the desk. I had my feet apart and my hand holding on the desk at the time it happened. It was a very unusual method of stopping. Mr. Lewis was the engineer. The train had been handled pretty rough that day. There was no signal given to me that the train was going to stop suddenly."

Speaking of the accident report made out for the company, the witness testified further that Captain Loper, supervising the report, said he had a good mind to put as the cause of the injury "the negligence of the engineer in handling the train," but desisted on the statement of Captain May, the conductor, that it might get Lewis into trouble. Asked the cause of the sudden stop of the train, the witness said it was either a "snap shot" brake or the "direct application of the air." The snap shot brake seems to have been some defect in the mechanical contrivances for applying the air. The defendant's witnesses, the engineer and others, stated there were no snap shot brakes, and no defect in the mechanism for applying the air, and accepting these and other relevant statements making in favor of plaintiff's claim as true, it permits as the more reasonable inference that the sudden stopping and consequent injury was caused by the negligence of the engineer in handling his train. For this negligence the company is held responsible by the express provisions of the statute, and in our opinion the evidence permits and requires that that issue be submitted to the jury.

It is urged for the defendant that the court, in its charge, erroneously recognized the doctrine of *res ipsa loquitur* as applying to the case, and we were referred to numerous decisions of the Federal Court, to the effect that the position in question has no application to cases between employer and employee. These decisions, however, arose prior to the enactment of the Employers' Liability Act, or in cases which did not come under its provisions. The position withdrawing cases of employee and employer was due chiefly to the prevalence also of the fellow-servant doctrine by which an employer was relieved from liability for injuries due solely to the negligence of the fellow-servant, and from the uncertainties as to the cause of the injury thereby created, the facts in nearly all of the cases indicating the negligence by some fellow-servant as the more probable cause of the injury. The statute having, as we have seen, abolished the fellow-servant doctrine, there is doubt

if the Federal Courts will adhere to the distinction adverted to in cases controlled by its provisions.

The contrary has been held in *S. Ry. v. Derr,* 240 Fed., 73, and this would seem to be the correct deduction from the premises.

The position, however, as we view it, is not open to defendant on the record. His Honor only referred to the doctrine of *res ipsa loquitur* as affording a circumstance which required that the issue of defendant's negligence should be submitted to the jury; no specific objection is made to the charge on that account, and on a motion to nonsuit the occurrence itself, and all the accompanying facts and circumstances offered in evidence and which tend to establish liability, must be given consideration.

Again, it is insisted that the entire facts show that defendant is barred of recovery by reason of the assumption of the risks, a defense expressly recognized by the statute, and numerous decisions were cited to the effect that an employee assumed the risks of the jars and jolts which may be expected to occur in the operation of freight trains. The decisions referred to so hold, but it is also the recognized principle that an employee does not assume the risks due to the instant and unexpected negligence of the employer under circumstances which afford the employee no opportunity to know of the conditions that threaten or to appreciate the risks.

In *Jones v. R. R.,* 176 N. C., 260, it was held: "A brakeman on a freight train, under the Federal Employers' Liability Act, does not assume the risks of the sudden, unusual, and unnecessary stopping of the train by the engineer thereof while making a flying switch which, without warning, caused the injury complained of in the action."

And speaking to the question as it prevails under the statute, the Court in the opinion said: "While the law in question clearly recognizes the assumption of risk as a defense in certain instances, under section 4 such a position is absolutely inhibited in cases where the violation of a Federal statute, enacted for the protection of the employees, contributed to the injury or death of employees; and by correct deduction from the terms and meaning of section 1, making railroads engaged as common carriers of interstate commerce liable in damages for injuries or death caused by the negligence of their officers, agents, or employees, the negligence of fellow-servants is withdrawn from the class of assumed risks in cases of unusual and instant negligence and under circumstances which afford the injured employee no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based upon knowledge, or a fair and reasonable opportunity to know, and usually this knowledge and opportunity must 'come in time to be of use.' 26 Cyc., 1202, citing 160 Ind., 583. This principle is

very generally approved in the cases and text-books on the subject; and in authoritative Federal decisions construing the act in question, in reference to the negligence of fellow-servants and the incidental assumption of risks, it has been held that the effect of this first section is to place the conduct of fellow-servants on the same plane as the employer himself in such cases, and it is fully recognized that an employee does not assume the risks of his employer's negligence unless, as stated, he is given a fair opportunity to know and appreciate the risks to which he is thereby subjected." Citing *Chesapeake & Ohio Ry. v. De Atly,* 241 U. S., 311; *Yazoo, etc., Ry. v. Wright,* 234 U. S., 376; *Seaboard Air Line v. Horton,* 233 U. S., 492; *Gila Valley, etc., Ry. v. Hall,* 232 U. S., 94; *Texas & Pacific Ry. v. Behymer,* 189 U. S., 905; 2 Employer's Liability Cases, 223 U. S., 1; *Brybowski v. Erie R. Co.,* 88 N. J. L., 1 (95 At., 764); Richey on Fed. Emp. Liability Act, sec. 59.

We were also referred by defendant to *Patton v. Ry.,* 179 U. S., 650, as an authority against plaintiff's right to recover on the facts of the present record.

In that case plaintiff, a fireman on an engine drawing a passenger train from El Paso to Toyah and return, some three or four hours after one of those trips had been made and while the engine was being moved in one of the railroad yards at El Paso, attempted to step off the engine and in doing so the step turned, and he fell so far under the engine that the wheels passed over his foot and amputation became necessary. The allegation being that the step turned because the bolt which held it was not securely fastened. It was found that ample and competent inspection was provided for, both at El Paso and Toyah, and no defect had been discovered. There was also testimony that the fireman, for his own convenience, was doing the work at the time before the engine was prepared and inspected for the succeeding trip, and further that the step might have been presently loosened in throwing heavy lumps of coal on the tender by the yardman or other employees in the line of their duties. That case, however, was prior to the enactment of the Employers' Liability Act, and when the fellow-servant doctrine was fully recognized, and the Court, approving the doctrine that while an employer was required to furnish safe and suitable appliances for his workmen, he was not an insurer of their safety, held that on the facts presented there were too many uncertainties, both as to the time and cause of the occurrence to permit that the issue of liability be submitted to the jury.

The case does not seem to be applicable to the facts of this record, there being evidence as stated that the plaintiff has been seriously in-

jured by sudden, violent, and unusual stopping of a freight train, that this was due to negligence on the part of the engineer in operating it, and for which negligence the company, as shown, is now liable by the express provisions of the statute under which the suit is brought.

We find no error in the record, and the judgment on the verdict is affirmed.

No error.

ENGLISH LUMBER COMPANY v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 2 June, 1920.)

Evidence—Mutually Running Accounts.

Where, under an agreement with its depositor as to a line of credit to be extended him, there are almost daily transactions of loans, credits, substituted notes including demand notes on the depositor's collateral, which line of credit was agreed upon from time to time and kept exhausted, the mutual items being so interlocked as to make them practically inseparable, *Held*, such transactions constitute an open mutual running account for the period of time covered by them.

See S.c. *ante*, 211.

PETITION of defendant to rehear.

R. S. McCall, Pless & Winborne, and Murray Allen for plaintiff.
Bourne & Parker for defendant.

We have reëxamined this case with care, and see no sufficient reason for changing the former judgment of the Court.

It is not a case of disconnected transactions between a bank and its customer, but one of a mutual running account, based on one agreement for a line of credit, and where both parties kept one account showing debits and credits.

The judge finds: "That there were almost daily transactions in the nature of loans or credits allowed by the bank, taken up by substituted notes, substituted demand notes on customers' paper, all collateral, and on discounted customers' paper, all covered by the agreement as to the line of credit, which line of credit agreed upon from time to time was kept exhausted by the plaintiff, transactions being of practically daily frequence, each party keeping the whole of the accounts, the mutual items being so interlocked as to make them practically inseparable. So that it was, and was assumed to be, an open mutual running account

from 1 March, 1909, to the close of the transactions; the final settlement and payments being on 4 November, 1914."

This order and the interpretation of the former opinion are approved by the Court. Petition denied.

21 May, 1920. HOKE and ALLEN, JJ.

THOMAS J. MAUNEY v. E. B. NORVELL.

(Filed 2 June, 1920.)

1. Landlord and Tenant—Lease—Parol Lease—Statute of Frauds—Statutes.

A parol lease of lands for more than three years after the date of making the agreement is void under the Statute of Frauds, and our own statute, Rev., 976, and not from the time it goes into effect; and a parol agreement of lease to commence *in futuro* for the full three year period makes the tenant in possession a tenant at will, the rental price being that agreed upon in the parol lease.

2. Same—Acceptance of Rent—Waiver—Appeal—Bond.

A landlord, by accepting the rent from a tenant at will in possession, receives only that which is due him, and this cannot have the effect of waiving his rights under Rev., 976, to declare void a parol lease of more than three years, or render such lease a valid one; and on the tenant's appeal from a justice's court in a summary action of ejection, the tenant is required to give bond for the payment of the rent, etc., Rev., 2008.

3. Same—Deeds and Conveyances—Registration—Notice.

In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and, consequently, the lease must be in writing; and hence a parol lease, void under Rev., sec. 976, cannot have this effect. Rev., 980.

APPEAL by plaintiff from *Bryson, J.*, at March Term, 1920, of CHEROKEE.

The plaintiff began this action in summary ejectment before a magistrate for house and lot in the town of Murphy. The defendant was living in the house when the plaintiff bought it from Lane in March, 1918. Soon after purchasing the property, the plaintiff demanded possession, but the defendant did not surrender. The plaintiff was then sent to the army and the defendant paid rent every month, which plaintiff accepted. In February, 1919, plaintiff demanded possession by letter. The defendant replied, claiming a lease for 3 years beginning 10th of May, 1918, which was the first the plaintiff knew of such claim. He mailed the defendant a notice to quit and began this proceeding

before a justice. At that trial the defendant testified that in February, 1918, before plaintiff bought the place, he had rented it from Lane for three years, beginning 10 May, 1918.

On appeal the court being of opinion that the receipt of the rent by the plaintiff was an estoppel, the plaintiff in deference to the intimation of the court, took a voluntary nonsuit and appealed.

Dillard & Hill for plaintiff.

Witherspoon & Witherspoon and J. N. Moody for defendant.

CLARK, C. J. Rev., 976, provides: "All other leases and contracts for leasing lands, exceeding in duration three years *from the making thereof,* shall be void, unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

The lease under which the defendant claims was not in writing and he alleges it was made in February, 1918, to begin on 10 May, 1918, and was void. He was therefore simply a tenant at will, and if entitled to any notice to quit he was entitled only to a reasonable notice, and this was given at least three times.

Rev., 976, is taken from the English statute of frauds, 29 Charles II., ch. 3, which, in the second section thereof, invalidates leases "exceeding three years from the making thereof" and provides that where leases and conveyances of interest in land are not duly authorized in writing they "shall have the force and effect of leases or estates at will only."

The English decisions therefore hold that "under the English statute the period provided for must be counted from the making of the lease." *Rawlings v. Turner,* 1 Ld. Rym., 736, and this has been followed in this country generally, except in those States where the words "from the making thereof" are omitted, 20 Cyc., 215. In New York the trial court held that a lease beginning *in futuro,* not exceeding the prescribed period, was valid, because the new statute in that State had omitted the words (which are in the English statute, and which are retained in ours) "from the making thereof," but the Court of Appeals reversed this, and held that the limitation still ran from the making of a lease. Browne Statute of Frauds, secs. 33, 34, 36.

"Where one goes into possession of land under an invalid lease, his tenancy at the inception is a tenancy at will. And so it is held that the status of one holding under an invalid lease made pending occupation under a valid one, to take effect *in futuro* or under a void sale, is that of a tenant at will. The invalid lease in such a case governs as to the rent to be paid, but not as to the terms or character of the tenancy." 24 Cyc., 1039.

"A party who has been let into the possession of land under a contract of sale, or for a letting, which has not been completed, is only a tenant at will of the vendor, and his interest is determinable *instanter* by a demand for the possession." *Love v. Edmonston,* 23 N. C., 152.

The court erroneously held that the plaintiff, by accepting rent, was estopped to demand possession. The plaintiff is not suing for rents, but for possession. He is entitled to rents as long as defendant remains in possession, and the statute requires the defendant to give bond for rents if he appeals. Rev., 2008. The landlord does not waive anything if he accepts his rents every month, instead of waiting the termination of the suit. *Vanderford v. Foreman* 129 N. C., 217. Acceptance of the rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery. In action to recover the possession as the plaintiff is entitled to damages for the occupation of the premises the plaintiff can accept voluntary payments without thereby ratifying the tenant's possession, *ibid.* The receipt of money for the use of premises is not inconsistent with a demand for possession, for it has not misled the defendant nor put him to any disadvantage. *Vanderford v. Foreman, supra,* is very much in point, and is cited *Product Co. v. Dunn,* 142 N. C., 274.

The same section, Rev., 976, makes all contracts to sell or convey any land void unless in writing. In cases where there has been a sale of land without being in writing, if the vendor accepts the whole of the purchase money, or any part thereof, it is not an estoppel on him to recover the land, but he must account for the purchase money received, and betterments. This was settled in this State long ago, denying the doctrine of part performance, by *Gaston, J.,* in *Albea v. Griffin,* 22 N. C., 9, and it has always been approved since, see Anno. Ed. If, therefore, the receipt of the entire purchase money, and the surrender of possession to the purchaser and the erection of improvements is not an estoppel, certainly the receipt of the rent from time to time is not an estoppel, against an oral lease for more than 3 years.

Besides, Rev., 980, renders invalid conveyances, or contracts to convey, or leases of land for more than three years, unless registered as against purchasers for a valuable consideration. The plaintiff purchased this house and lot from Lane in March, 1918, and under his deed he acquired title as against any unregistered conveyance thereof, or any unregistered lease which could continue for more than three years from that date. If an oral lease for 3 years beginning in future would be valid at all it would be valid no matter at what time in the future it would take effect, and if one such lease would be valid, a succession of them would be valid, and the protection of the statute in favor of purchasers would be lost, for the defendant's lease not being in writing was necessarily unregistered.

The payment of the rent did not create a lease between the plaintiff and the defendant, but was simply for the use and occupation of the premises for which therefore he could not be charged upon eviction. If not paid, the judgment of eviction would have contained judgment for the amount of rent due, and for that reason the defendant was required to give a defense bond, Rev., 2008, which was doubtless dispensed with in this case because of such payments.

Reversed.

ALTHEA COGBURN v. IRA L. HENSON.

(Filed 2 June, 1920.)

1. Courts— Terms— Expiration— Consent of Parties — Continuance of Term.

The term of the court expires when the judge finally leaves the bench whether the statutory time has expired or not, and motions to set aside the verdict of a jury or other like action in the case cannot be entertained at the next term, except by consent of the parties.

2. Same—Reservation of Rights of Parties.

An agreement by the parties to an action, the last case on trial at the expiration of the term, that "the judgment may be signed out of term and out of the county" in effect continues the term in so far as it affects the particular matter, but reserves the right to each party to have the judge exercise the discretionary powers over the verdict, invested in him by law, and his action in setting the verdict aside in his discretion, at the next subsequent term of the court, is within the purview of the agreement, and valid. This custom is discouraged by the Court, as a bad one.

3. Same—Signing Judgments—Ministerial Acts.

The mere signing of the judgment, upon the verdict, is a ministerial act which requires no agreement of the parties for it to be done after term. *Knowles v. Savage*, 140 N. C., 372, modified.

WALKER, J., dissenting.

APPEAL from *Ray, J.*, at July Term, 1919, of HAYWOOD.

The trial ended on Saturday afternoon, the last day of the term. The jury had not returned their verdict at 4:45 p. m. and the trial judge desiring to board a train scheduled to depart at 4:51 p. m., had the following entry made by consent of counsel for plaintiff and defendant:

"It is agreed by the counsel for the plaintiff and the defendant that the jury may return their verdict to the Clerk, and that the judgment may be signed out of term and out of the county."

The judge then left the court to board the train, and the jury afterwards returned a verdict in favor of the defendant. No judgment was signed at the July term, but at the following (September) term his Honor entered the following:

"In this cause, the same being tried at the July Term, 1919, of this court, and a verdict on the issues found by the jury in favor of the defendant, and counsel agreeing that the court might sign judgment out of term, and out of the county; the court now, in its discretion and upon its own motion, set the verdict in said case aside and orders the case to be reinstated on the civil issue docket of this court to the end that a new trial be had upon issues submitted before another jury."

Defendant appealed.

G. S. Ferguson and J. Bat Smathers for plaintiff.
W. J. Hannah and J. T. Horney for defendant.

CLARK, C. J. When the judge *finally* leaves the bench at any term of court, the court expires whether the week has ended or not. *Delafield v. Construction Co.*, 115 N. C., 21, and citations thereto in Anno. Ed.

Motion to set aside the verdict, or take other action in the case at the next term, cannot be entertained, except by consent, because to do this would be to permit in effect an appeal from one Superior Court judge to another, and of course if this were allowable an appeal from such action could be taken to the next term of the Superior Court, and so on *ad infinitum*. Even if the judge before whom the motion is made at the next term of court were the same judge his memory of the evidence would be dimmed by the lapse of time.

While this is so, it has been the custom that when the judge is leaving after trying the last case at the term, an agreement of counsel that the verdict may be taken by the clerk and that the judgment thereon may be signed at any other time or place within the district, is not unusual. It may be said that it is a bad custom, and very frequently leads to inconvenient results, as in this case. It ought to be discountenanced and is only tolerated as a matter of convenience to avoid going over the trial again when all other matters of the court have been disposed of and counsel do not wish to detain the judge to await the result of the deliberations of the jury.

In this case, the usual agreement was made that the judgment should be signed by the judge at any other time and place, and the sole question is what is the just and reasonable construction of such agreement. It is the right of every litigant that after the verdict is brought in by the jury the party against whom it is rendered can move to set aside the verdict, if against the weight of the testimony, or contrary in the opin-

ion of the judge to justice. It is not reasonable to suppose that either side to the agreement in this case intended that it should be deprived of this supervisory power which the law from time immemorial has vested in the presiding judge to review and supervise the action of the jury. The jury may have misunderstood the evidence, or the charge of the Court, and sometimes may have been misled by the able arguments of counsel, or by local or personal bias. For this reason the losing party whoever he may be, has the right to have the judge supervise the verdict, and while he cannot reverse the action of the jury there must be the judgment of the court *rendered* after due deliberation upon the finding of the jury. As a great judge once said, in reviewing the action of the jury, on a motion to set aside the verdict, "It takes 13 men in this court to deprive a man of his land, his rights, or his liberty." It is not to be presumed that either party to this action contemplated such waiver of his rights to have the judge supervise the action of the jury. It must expressly appear by the agreement that such waiver was made of this important right.

The only reasonable and just construction of this agreement is that when the jury brought in their verdict in the absence of the judge the case should stand, precisely in the same light as it would have stood if the judge had been present, and the verdict was rendered, and for the purposes of this case, the term was constructively extended so that at any other time and place in the district the judge, counsel of both sides being present, should hear such motions as could have been heard if he had been present at the return of the verdict, and should take such action as he could have done under such circumstances. The agreement was that for the purposes of this action the term of the court was prolonged and this case should be treated by the judge as if that term of the court were in session. The judgment should then be *rendered.* No agreement was necessary as to a mere formal *signing.*

It is true that the agreement might have been made longer and more explicit, but the one entered was that which is usually made and was intended only to transfer the case after verdict, or rather continue it, in the same plight and condition to be heard before the judge upon such motions as could have been made had the judge remained and received the verdict, and he should render judgment.

The only case that bears a contrary construction is *Knowles v. Savage,* 140 N. C., 372. With all respect to the distinguished judge who wrote that opinion, for a unanimous Court, we think that this view of the matter was not presented nor passed upon; and that in view of the result of such ruling in depriving the losing party of the right to have the verdict reviewed, which he would have had if the court had remained in session, that part of the opinion in *Knowles v. Savage* should be not

followed. A blind adherence to precedent may have a far worse effect in depriving parties of their rights guaranteed by law, and in proper instances and when no property rights will be affected the opinion will be modified or overruled.

There are weighty reasons why this should be done in this case rather than deprive any party, "unbeknownst to himself" of his legal rights, and thus continue a practice which cannot subserve the ends of justice, which require that in every case the losing party should have the right to apply to the judge to revise and set aside the verdict, or at least to have his opinion upon it before he renders his judgment. An agreement to waive such rights must be explicit.

If the court had rendered judgment then signing it would have been a mere ministerial act, for which no agreement was necessary. The essential matter is that the judge should render judgment and until that has been done there has been no legal conclusion of the controversy.

There is no stipulation in this agreement that the judge should sign judgment "in accordance with the verdict." We should not insert these words. In literal compliance with the agreement he has signed judgment but the judgment is his own judgment, which in accordance with the power vested in him he has made "in his discretion and of his own motion," setting aside the verdict because against the weight of the evidence. And this judgment should be

Affirmed.

WALKER, J., dissenting: The plaintiff alleged that defendant, who is her brother, had committed a fraud upon her in drawing a deed by which he was directed to divide certain land equally between them, their father having given the direction, as part of the land belonged to him and he desired that plaintiff should have one-half of it. The deed was so drawn and executed, as to give the defendant thirty acres more than the plaintiff, his sister. The action was brought to recover damages for the fraud. Issues were submitted to the jury and answered in favor of the defendant.

The trial was concluded on Saturday, the last day of the term, but the jury did not deliver their verdict until 4:45 o'clock p. m. The judge desiring to take the eastbound train for Asheville, N. C., the following order was entered in the minutes by consent: "It is agreed by the counsel for the parties that the jury may return their verdict to the clerk, and that the judgment may be signed out of term and out of the county." The judge then left the courthouse to catch the train and went on it to Asheville. The jury returned the verdict to the clerk after the judge had left. No further action was taken in the case until September Term, 1919, when the same judge, of his own motion, set aside the verdict by the following order:

"In this cause, the same being tried at the July Term, 1919, of this court, and a verdict on the issues found by the jury in favor of the defendant, counsel agreeing that the court might sign judgment out of term, and out of the county; the court now in its discretion, and upon its own motion, sets aside the verdict in said case and orders the case to be reinstated on the civil issue docket of this court to the end that a new trial be had upon issues submitted before another jury." To this order, the defendant excepted and appealed.

The question we have before us is one as to the judge's power to set aside the verdict under the agreement of the parties as made at July Term, 1919. My opinion is that, under a former decision of this court, he had no such power, as it was held unquestionably, that an agreement, like the one in this case, does not authorize such action by him. This question arose some years ago and the Court fully considered it in *Knowles v. Savage,* 140 N. C., 372. The Court, in that case, stated it to be conceded, that a motion to set aside a verdict for insufficient testimony must be made before the judge who tried the case, at the term in which the verdict was rendered (Rev., 554); *Moore v. Hinnant,* 90 N. C., 163; *Turner v. Davis,* 132 N. C., 187, and the judgment must be entered during the same term, unless otherwise agreed by the parties. The same contention, as here made, was the identical one put forward in that case, which is that an agreement authorizing the judge to sign the judgment after the adjournment of the court for the term, included the power to hear and determine a motion for a new trial, or to set the verdict aside, for error in fact or law, but the Court rejected this view, as it was not based on a reasonable construction of the agreement. It is urgently insisted that this was error, and that such an agreement, obviously implies, that preliminary motions, for a new trial etc., may be submitted and passed upon. We admit there is great force in the contention. They argue that neither party would take the risk of the judge having the power to sign a judgment, not knowing what the verdict would be, without the right of appeal and review. If he did, it would be very imprudent on his part, and greatly jeopardize his interests, and perhaps destroy them. If he could move for a new trial when there was error in law, or to set aside the verdict, as being against the weight of the evidence, or because the damages allowed by the jury are excessive, or for any other good, and valid reason, important and valuable rights might be saved. For this and other reasons they insist that the parties intended to retain the benefit of those remedies which are essential to preserve their rights, when error has been committed by the court or jury. The argument may be plausible, and quite persuasive, in support of their position, but it has been thoroughly considered and weighed by the Court, and failed to produce conviction as

to the correctness of plaintiff's view. The Court, in *Knowles v. Savage, supra,* said that signing a judgment is a ministerial act, involving no exercise of judgment or discretion, and, if omitted for any reason, could be done at a subsequent term, as decided in *Ferrell v. Hales,* 119 N. C., 199, but that hearing and determining a motion to set aside a verdict is a different matter, as it calls for recollection of the testimony, manner, and demeanor of witnesses, and other incidents of the trial not likely to be impressed upon the memory of the judge, so that he may safely act upon them after adjournment. The Court then gave this admonition: "While convenience of counsel often occasions, and usually justifies, outside agreements of the character made in the case, they frequently lead to confusion and irregularity in the administration of justice. The court will not by construction extend their terms beyond the fair and reasonable import of the language used. We concur with his Honor that he had no power after the adjournment of the term to hear and pass upon the motion." The difference in the views thus presented is, that one adopts a literal or strict construction, and the other a liberal construction of the agreement with the purpose of giving effect to the presumed intention of the parties. The case of *Knowles v. Savage, supra,* was cited in *Stilley v. Goldsboro Pl. Mills Co.,* 161 N. C., 517, but there was no agreement in that case by the parties as to signing the judgment after the term of court had expired; it was simply a motion to set aside a verdict in vacation because of newly discovered evidence, which was made in term, but continued for hearing to the next term of the court, by order of the judge, in the absence of the plaintiff and his counsel. The *Knowles case* was also cited in *Pfeifer v. Drug Co.,* 171 N. C., 214, but the point in this case was not presented. The court simply entered judgment on a verdict rendered at a former term, which was held to be regular and according to the course and practice of the court.

There is, at least, sufficient doubt, as to the true meaning of the agreement, to call for an adherence to the principle, that cases should not be lightly overruled, and not at all except where there is clear and manifest error. The *Knowles case,* was a well considered one, and the opinion written by an able and learned judge, and its right to continuance as a precedent is supported, at least by the fact that it construes the agreement according to the language of the parties to it, and the form of expression they selected to declare its meaning as it was understood by them at the time, while the Court's view requires construction of it, by inference or implication as to what it means. The parties had the right to make the agreement, as it is confining the action of the judge to the mere signing of the judgment. All this but tends to show that the question is not so entirely free of doubt as to justify overruling *Knowles v. Savage, supra.*

It would have been easy under a contrary decision, for parties to frame such agreements, so as to provide that the judge shall have the same power and jurisdiction as if all matters had been disposed of in term, and thereby preserve the right to make all motions and review all decisions of the court by appeal.

If we are to abide by precedent, and adhere to our former decisions, we should have held that *Knowles v. Savage* is fatal to the plaintiff's present contention, and therefore there was error. It follows that the order of the judge should have been set aside, the verdict reinstated and judgment entered thereon in accordance with the law, as declared in the *Knowles case.*

I shall, though, hereafter accept this decision of the court and abide by its construction of such agreements as it is only a question of procedure, which should be finally decided, and closed.

MRS. B. M. MOORE, ADMINISTRATRIX OF B. M. MOORE v. DIRECTOR GENERAL OF RAILROADS, ET AL.

(Filed 2 June, 1920.)

1. Issues—Negligence—Employer and Employee—Master and Servant—Federal Employer's Liability Act—Statutes—Separate Issues—Legal Dependents.

In an action to recover damages for the negligent killing of the deceased by a railroad company while engaged in interstate commerce under the provisions of the Federal Employer's Liability Act, an objection is untenable that the damages should have been assessed *in solido* upon a single issue, nor is it reversible error to have submitted separate issues on that question, as to each of the legal dependents of the deceased, applying to each the approved interpretation of the Federal Statute, that the pecuniary loss suffered or to be reasonably expected by such dependent is a measure of liability. *Horton v. R. R.*, 175 N. C., 472, and *Hudson v. R. R.*, 176 N. C., 488, cited and applied.

2. Evidence— Nonsuit— Federal Employer's Liability Act— Motions— Statutes—Employer and Employee—Master and Servant.

Under the Federal decisions and those of our State Court, the rule of procedure on a motion to nonsuit upon the evidence, equivalent with us to a demurrer thereon, the facts presented which make in favor of plaintiff's claim must be accepted as true, and interpreted in the light most favorable to him.

Evidence examined and held sufficient to carry the case to the jury on the issue of defendant's liability.

CIVIL ACTION, Under the Federal Employer's Liability Act, to recover damages for alleged negligent killing of plaintiff's intestate, tried

before *Bryson, J.*, and a jury, at at January Term, 1920, of HAYWOOD.

Plaintiff alleged and claimed that on 28 July, 1918, her intestate, an employee of the railroad company, under charge and control of defendant, was negligently run over and killed by the kicking or shunting of cars on to the track on or near which the intestate was standing at the time.

There was denial of liability by defendant, plea of contributory negligence and assumption of risk, etc. The proof showed that the intestate left him, surviving, his widow, the present plaintiff, and two infant children, a girl, Vernell Moore, three to four years of age, and a boy, Maurice or Morris Moore, aged one month or over, dependent on intestate within the meaning of the statute, and on this and further evidence offered, the jury rendered the following verdict:

"1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer? Answer: 'Yes.'

"3. Did the plaintiff's intestate assume the risk of being killed in the way and manner he was killed? Answer: 'No.'

"4. What damage, if any, is plaintiff entitled to recover for herself, as the widow of her intestate? Answer: '$1,000.'

"5. What damage, if any, is plaintiff entitled to recover for the infant, Vernell Moore? Answer: '$2,000.'

"6. What damage, if any, is plaintiff entitled to recover for the infant, Morris Moore? Answer: '$2,000.'

Judgment for the aggregate amount on this verdict for plaintiff, and defendant excepted and appealed, assigning errors.

T. A. Clark and Felix E. Alley for plaintiff.

Martin, Rollins & Wright for defendant Director General, etc.

HOKE, J. On the argument before us, defendant's counsel rested their right to a new trial upon the two objections, first that the question of damages was submitted on separate issues as to each of the dependents, second that on the entire testimony defendant's motion for nonsuit should have been allowed.

In reference to the first position, it has been recently held with us in two or more cases where the question was directly considered that under the Employer's Liability Act and the authoritative Federal decisions construing the same, the award of damages might be properly assessed upon separate issues. *Hudson v. R. R.*, 176 N. C., 488; *Horton v. R. R.*, 175 N. C., 472-477.

In *Horton v. R. R.,* the Court, in approving a verdict similar in form to that rendered in the instant case, said: "Under the State statute the jury assesses the value of the life of the decedent *in solido,* which is disbursed under the statute of distributions. Under the United States statute, the jury must find as to each plaintiff what pecuniary benefit each plaintiff had reason to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained some pecuniary loss. *R. R. v. Vreeland,* 227 U. S., 173; *R. R. v. Zachary,* 232 U. S., 248. In the latter case the Court said: 'The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This of course excludes any recovery in behalf of such as show no pecuniary loss.'

"This was not overruled in *R. R. v. White,* 238 U. S., 207. In the latter case the defendant did not ask to have the damages apportioned by the jury, but moved for arrest of judgment after the verdict was rendered because the verdict was a general one. The Court merely held that the verdict was not void because not apportioned and that the apportionment was no concern to the defendant, who can not be heard if it did not except on the trial. None the less the plaintiff has a right, as in this case, to have the jury apportion the recoveries."

Under the Federal decisions referred to in this excerpt, even if the question of damages had been submitted on a single issue as defendant desired, the estimate of the amount would have been determined according to the rule or principle expressed in these separate issues, and to our minds the exception presents no substantial objection to the validity of the trial.

As to the second objection, it is the rule prevailing in both State and Federal procedure that on a motion for involuntary nonsuit, equivalent with us to a demurrer to the evidence the facts presented which make in favor of plaintiff's claim, must be accepted as true and interpreted in the light most favorable to him. *Lamb v. R. R.,* at the present term, p. 619, citing, among other authorities, *Aman v. Lumber Co.,* 160 N. C., 369; *Biles v. R. R.,* 143 N. C., 78; *Chinoweth v. Haskell,* 3 Peters, 92; *Pawling v. U. S.,* 4 Cranch, 219.

Considering the record in view of this principle, there were facts in evidence on the part of plaintiff tending to show that intestate at the time of his death was the member of a switching crew engaged at the time in shifting cars on the railroad yards at Canton, N. C., under the control and direction of the yardmaster, Jesse Harrison. That at this

station there was the main railroad track running east and west and just south of this and parallel was a siding known as the house track for the use and occupation of cars hauling general freight.

North of the main track were a number of sidings, principally for cars hauling freight, etc., for the Champion Fibre Company, arranged and numbered as follows:

Some distance west of the station there was a lead track, switched off from the main track and running clear through the company yard, for the greater part some distance from the main track, but substantially paralleled to it, and from this lead track several sidings ran out into the yard between the lead and main tracks, numbered from the main track 1, 2, 3, 4—No. 4 being the one nearest the lead track.

That at the time of the occurrence the switching engine ran from the lead track onto track No. 4, and was connected with a train of 8 or 9 cars thereon, and on signal given, drew these cars out onto the main lead track, the train so constituted being long enough to extend past the switch of this lead track and in part onto the main line; on further signal given, the train was started back and the four rear cars having been detached on attaining sufficient speed, the engine slowed down, leaving these four rear cars of their own momentum to pass down onto the main lead track, at or near which the intestate was then standing, and was by them run over and injured so that he soon thereafter died.

The evidence showed that the four or five forward cars of the train were to be switched over to the house track, but that the rear cars holding coal for the Champion Fibre Company were thus kicked or shoved down on the main lead track to be run to the coal chute of the fibre company further down on the yard.

There was no bell rung nor signal given when this train was started back after being pulled out of track 4 and no one was on the cars at the time to control them or to signal to any one who might have been on the main lead track.

The yardmaster at the precise time of the killing was not immediately present, but had gone a hundred feet or more over toward the house track to run a child off from that track, where four of these cars were to be presently placed, and intestate at the time standing on or near the main lead track was looking at the yard master engaged as stated.

There was no proof offered that the yardmaster had informed the crew, or any of them, where these four coal cars were to be placed, except by marking them with chalk on the side 2 x 2, or Champion Fibre Company, the testimony leaving it uncertain whether the intestate knew of this marking or what it signified.

There were facts in evidence also tending to show that at the time of

the occurrence, or immediately thereafter, some of the crew, including the yardmaster, asked the intestate while he was still conscious how it happened and he replied that he did not expect them to back on the main lead track, or that the train had backed on the wrong track. It was further shown, or there was evidence tending to show, that it was the custom to leave the fibre company cars on track No. 4 till they were to be run into the company yards to deliver their contents, and if these cars had been backed onto track No. 4 they would not have struck the intestate, and further, that while this yard on the north of the main track was used chiefly for the company's business, it was not in fact a closed yard, but there were tracks or trails along or across the same, near to the place of the killing not infrequently used by employees and others, and plaintiff also put in evidence three rules of the company. Rule 783, defining the duties of the yardmaster in terms as follows:

"They have charge of their respective yards, and of the making up and distribution of trains, and the handling of cars therein, and of all yard employees and engine men and train men while in the yard limits." And Rule 393: "They must not allow running or flying to be made when it can be avoided, and when unavoidable, such movements must be made with all the care necessary to absolutely prevent accident." Also Rule No. 30, to the effect that "the engine bell must be rung when an engine is about to move."

It was further testified that afterwards, the yardmaster, speaking of the occurrence, had said that he felt he was the cause of intestate's death. "That Moore was standing at his post ready to grab the coach, or car, as it came by, and something went wrong; that they either kicked or shoved the cars in there, and they ran over him and knocked him off; that something went wrong; he did not say what it was," etc.

There is much evidence in the record tending to exculpate defendant, and to show that the death of the intestate was due to his own neglect, but this comes from defendant's testimony, or from an interpretation of the facts favoring this position, and applying the accepted rule that on a motion for involuntary nonsuit it is only the facts and inferences supporting plaintiff's claim may be properly considered, we think it clearly the permissible and reasonable conclusion that defendant's agents and employees on this occasion, and for whose conduct defendant is responsible, were not sufficiently careful of defendant's safety, and that their breach of duty was the proximate cause of intestate's death.

While this was a shifting yard of the company, there were facts in evidence tending to show that it was by no means a closed yard, but there were trails or paths along or down the tracks at or near the place.

In such case, with or without a rule, it is always considered highly dangerous to kick or shift cars onto a track detached from an engine,

and without any one in position to control their movements or warn persons who may be upon the track, employees or others.

There were also facts in evidence tending to show a custom that the fibre company's cars were always left on track No. 4 till they were needed by the company, and that there was no sufficient notice given that in this instance the custom would be departed from or that the cars were then required and were to be backed upon the main lead track where the intestate was standing. Four of these cars were to be backed on the house track, and Harrison, the yardmaster, was over there at the time driving a child off the house track, lending color to the inference that the train was to be presently backed on to the house track—a conclusion that finds much support in the declarations of the intestate made to several persons immediately after he was "struck," that he was not expecting the cars to come back on the lead track where he was standing, or "they had come back on the wrong track"; and further, in the declaration of the yardmaster "that something had gone wrong."

We are cited by counsel to the case of *Aerkfetz v. Humphreys,* 145 U. S., 418, as a decisive authority in support of defendant's motion. That case could very well be upheld on the ground of contributory negligence of the plaintiff, a position that was much relied upon throughout the opinion, and which is not now a complete defense, nor one available on a motion to nonsuit. *Grand Trunk Ry. v. Lindsay,* 233 U. S., 42-47. It was shown, too, that the cars were attached to the engine, and were being moved at the right time, in the right place, and at a proper rate of speed, the single imputation of negligence being that no bell was rung or signal given at the time; no rule seems to have been shown, as in this case, permitting the construction that such a signal was required, nor was there any evidence of negligence *ultra* which might have misled the claimant to his hurt. And in *Hinson v. R. R.,* 172 N. C., 646, also referred to by counsel, plaintiff was injured while attempting to cross rails under the drawheads of cars, standing on a live track, with nothing to show that the engineer or others operating the train knew, or had any reason or opportunity to know, of plaintiff's position or danger, and to our minds neither of these decisions seems to us an apposite authority on the facts of this record. The case, we think, comes rather under *S. Ry. v. Smith,* 205 Fed., 360, and cases of that kind, which require that on evidence similar to that now presented the issue of negligence should be submitted to the jury.

There is no error, and the judgment on the verdict is affirmed.

No error.

WALKER, J., dissenting: This action was brought under the Federal Employer's Liability Act, and is, therefore, to be decided under the

Federal law. *Meadows v. Tel. Co.*, 173 N. C., 240, citing *Fleming v. R. R.*, 160 N. C., 196; *Lloyd v. R. R.*, 166 N. C., 24; *Tilghman v. R. R.*, 167 N. C., 163 (*same case* on writ of error); *S. A. L. Railway Co. v. Tilghman*, 237 U. S., 499; *Railway Co. v. Renn*, 241 Y. S., 290. This being so, the decision of the case is governed by *Aerkfetz v. Humphries*, 145 U. S., 418, as the facts of the two cases are not materially different but substantially the same. If there is any essential difference, it is in favor of the defendant. The plaintiff's intestate was employed by the defendant as a switchman, and was an expert in his business. He was ordered to handle the very cars by which he was killed, and was standing in, or close to the track upon which the cars were moving. It was broad daylight, and the moving cars were plainly visible to him, there being nothing to obstruct his view of them, and right here occurred the negligence, all his own, which caused him to lose his life. He was standing on or near the track, not engaged in the actual performance of his work, but looking at the conductor removing a child from the main line about forty yards east of the place where he was killed. If he had been attending to his duties and looking in the right direction, this case would not be here.

The Federal Supreme Court, and this Court as well, has held repeatedly that a railroad track is itself a place of danger, and a sufficient warning to any one on it that prudence requires of him to take care of himself by using proper precaution for his own safety, as by looking and listening for approaching trains. The exact language was: "The track, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, and that there can be no danger from them." The decisions in other States are clearly against the principle that circumstances like those we have here take the case out of the general rule, and it is held that no custom of the railroad company to run its trains according to a certain schedule, or to use one track and not another, or to run its trains at certain times in one direction (east), and at other times in another (west), will excuse one using its tracks from looking and listening, or requires the engineer to presume that he has not done so, but, on the contrary, it is held that he is within the zone of danger, however and wherever the track is located. *R. R. v. Hart*, 87 Ill., 529; *Morgan v. R. R.*, 116 C. C. A. (196 Fed., 449); *Kinnare v. R. R.*, 57 Ill., 153; *White v. R. R.*, 73 N. Y. Suppl., 827; *Smith v. R. R.*, 141 Ind., 92; *Boyd v. R. R.*, 50 Wash., 619. Many other cases might be cited, some of them being in defendant's brief.

The Court said, in *Morgan v. R. R., supra:* "It is altogether probable that he acted on the daughter's statement that the train did not come down that track; but he had no right to do so. Which of the

tracks would or should be used for its various trains was, of course, a matter for the exclusive determination of the railroad company." It was held in *Rich v. R. R.*, 31 Ind. App., 10, that a traveler using a railroad track has no right to confine his precautions to his knowledge of the schedules and customs of the company, but must take due care against the approach of "extra trains," and even "wild trains," those which are expected as well as those not expected to use the track on which he is walking. And in *White v. R. R., supra,* the Court stated that the accident was due entirely to the plaintiff's want of proper care for his own safety in relying upon his expectation, which was according to the railroad company's usage, "that the train by which he was struck would not come upon the track. He must look out for all trains, and any other rule, it was said, would measure his conduct by the altogether too liberal rule of chances and risks, and would impose upon the railroad company too rigorous and burdensome responsibilities," regardless of the inconvenience to the public arising from operating its trains under any such handicap. See, also, *High v. R. R.*, 112 N. C., 385; *Ward v. R. R.*, 167 N. C., 148, especially at p. 151 and at p. 152.

The same high Court, to which we have referred above, has said in somewhat different language from that quoted above: "The track itself, as it seems necessary to repeat with emphasis, is itself a warning. It is a place of danger, and a signal to all on it to look out for trains. It can never be assumed that trains are not coming on a track, and that there can be no risk to persons on the track from them." See 164 N. C., at margin p. 95, where the same principle is approved, and the cases decided in this Court to the same effect are collected. Turning again to *Aerkfetz v. Humphries, supra,* the Court said in that case, the facts of which are practically identical with those now before us: "There could have been no thought or expectation on the part of the engineer, or of any other employee, that he (the employee), thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The *ringing of the bell and the sounding of whistles* on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach." And again: "Any ordinary at-

tention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to step one side as they moved along the track. It cannot be that under these circumstances the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees, who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants, and if by any means negligence could be imputed, surely the plaintiff, by his negligent inattention, contributed directly to the injury. The judgment was right, and is affirmed." It must not be overlooked, or disregarded if seen, that in the *Aerkfetz case,* the Court held that the company was not guilty of any negligence, and that the death was caused *solely* by the plaintiff's own negligence, though it added, that if this were not true, the plaintiff was guilty of such contributory negligence as would bar his recover (and under present law affect only the measure of damages). If a person will not look when he can easily see that cars are coming which will injure him if he does not avoid them by stepping out of the way, but blindly and recklessly continues in a place of danger, he has no one but himself to blame for the resulting injury. The risk of such conduct is as plainly assumed as any risk could be. The intestate at the time of the accident was in full possession of his faculties, and could, with one motion, have placed himself beyond any possible danger. Having failed in his duty to himself, he will not be heard to charge defendant with consequences following solely from his own wrong.

The case of *Hinson v. R. R.,* 172 N. C., 646-648, would seem to be decisive of this one. It cites and quotes from *Aerkfetz v. Humphries, supra,* and adopts what is said therein, and then holds that, as the case should be considered, and decided, under the Federal law, the injury was caused by the plaintiff's own fault, and it alone, and that he was not entitled to recover. See, also, *Smith v. R. R.,* 130 N. C., 344.

It may clarify the matter if we quote from the testimony, which shows that the deceased was alone to blame, of plaintiff's witnesses, except where otherwise indicated: "I did not see the railroad man do anything only he motioned for him to come back and he started the engine; the man I saw motion was right down below me about 15 or 20 feet; he motioned to the engineer; I do not know who the man was who did the motioning; when he saw the motion the engineer started the train backwards down the track, and he got to going pretty fast and cut three coal cars loose, and they went on down there and knocked him (Mr. Moore) down. . . . Mr. Moore was facing towards his house when the cars were cut loose; he was standing sidewise; I did not see any other man around there just before the cars struck him. . . . I do

not know how long he continued to stand two feet from the track; the engine moved these cars back down this main lead; as they moved them back he was standing on the track as they came back; he was on the track; was over from the rail; on the inside of the rail before the cars hit him; he never moved out of the way at all when the cars were coming down, not until after the cars hit him and the cars pushed him down. . . . I saw the man giving the engineer the signal to come back; when he gave the signal he came back with his train; the engineer was on the right-hand side; that was the side Mr. Moore got run over on; I do not know where the man was standing that gave the signal for him (the engineer) to come back; he was above me a good piece. He was 150 feet, I guess, from where Mr. Moore was; Mr. Moore could have seen him give the signal. . . . At the time they lifted him up Mr. Harrison asked him how he came to get under there, and he said he was watching him get that little negro boy off the track, and that he did not know that the cars were coming in on the track or either they come in on the wrong track." The yardmaster, defendant's witness, testified: "I think they got that wrong about my having a conversation in the presence of Mr. Down with Mr. Moore in reference to how he got killed. H. B. Harrison is my brother. The only thing Moore said to me (he called me Harry), he says, 'Harry, this is awful.' I left him at once to go to the first-aid room of the Champion Fibre Company to get a stretcher, and I left him with H. B. Harrison." H. B. Harrison, defendant's witness, testified: "I asked him how it happened, and he said he was watching Harry—that is the yardmaster—and a little negro, and was not paying any attention to what he was doing, and the cars hit him. That is all I believe he said to me at that time."

It appears from this recital that the deceased was not looking out for moving engines or cars, but in quite another direction, and this was the efficient and proximate cause of the catastrophe. If they were making a flying switch it does not aid the plaintiff's case, because the intestate was himself "an experienced railroad man and switchman." It was a part of his duty to help in making such switches.

What the yardmaster may have said is immaterial. It is not substantive evidence, but, at most, contradictory. The facts are all before us, so that the Court can itself determine, as matter of law, who caused the death of Moore, without regard to any opinion on that subject from a mere witness. There was no culpable negligence of the defendant railroad company, as it was engaged in its ordinary daily work of shifting cars, and in the usual way. It was not bound to look out for its switchmen, employed in the same work, and who were expected to use care and protect themselves, something they could easily do, if attentive to their work. The case falls directly within the principle of *Aerkfetz v. Humphries, supra.*

As to the damages: The plaintiff cites *Gulf, etc., Railroad Co. v. McGinnis,* 228 U. S., at p. 176, to support a distributive, or apportioned, verdict, but it does not do so, and if it did, the latter case of *Central Vt. R. R. Co. v. White,* 238 U. S., 507, disapproves such a verdict, deciding that the distribution, or apportionment, of the fund to be recovered *in solido* is for the probate courts of the particular jurisdiction, and not for the jury to make. The Court says: "The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the States in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damages, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for probate courts and not for jurors." That case was cited in *Horton v. R. R.,* 175 N. C., at p. 488.

For the foregoing reasons, we dissent from the conclusion of the Court in this case.

BROWN, J., concurring in dissent.

J. L. WHITTINGTON, ADMINISTRATOR v. VIRGINIA IRON, COAL AND COKE COMPANY.

(Filed 2 June, 1920.)

1. Courts— Sister States— Decisions— Master and Servant— Employer and Employee—Safe Place to Work.

The courts of this State and of Virginia are in harmony upon the principle of the non-delegable duty of the employer to provide a reasonably safe place for the employees to work in the observance of due or reasonable care, and this principle will be applied on the trial here, when the cause of action arose there.

2. Evidence—Negligence—Conjecture—Circumstantial Evidence.

While evidence which does no more than raise a conjecture or suspicion of a negligent act alleged is not alone of sufficient probative force to be submitted to the jury, this act may be proved by circumstantial evidence, and if the facts proved render it probable that the defendant violated its duty, the question is for the jury to decide.

3. Same—Mines—Master and Servant—Employer and Employee—Proximate Cause.

Where negligence is relied on in an action against the operator of a coal mine that he had failed in his duty to provide his employee a safe place to work therein, etc., evidence is sufficient for the determination of the jury, that tends to show he had permitted an accumulation of rubbish called "gob," in miner's parlance, along the track in a tunnel whereon the wheels of a coal car ran, driven by a tandem of mules by the employee, so as not to leave enough or the usual space between the sides of the car and the ridge or side of the tunnel, required for the safety of the employee in giving the attention necessary to the performance of his work, and that as a reasonable or probable result therefrom under the conditions, and as the proximate cause, the employee was found dead on the track, under the car, though there was no eye witness to the killing or the immediate circumstances surrounding it.

4. Same.

Upon motion to nonsuit the evidence, the courts will accept as true the plaintiff's evidence, and resolve every reasonable inference in his favor; and where the evidence tends circumstantially to show that an employee to drive a coal car in the tunnel of a mine met his death through the negligent failure of his employer to leave him proper space in the tunnel to perform his work, and this was the proximate cause of his death, for which damages are sought in the action, it is immaterial whether the dangerous conditions existing at the time caused the employee to walk on the outside of the rails in the performance of a duty, and stumbled and fell, or he was forced between the rails by the conditions on the outside, and the death resulted in one way or the other, if the inferences are permissible in either event that it was the proximate cause of the defendant's negligent act, and the defendant would be liable in the absence of contributory negligence on the plaintiff's part.

5. Limitation of Actions— Pleadings— Amendments— Statutes— Sister States—New Cause of Action.

When the cause of action for damages for a wrongful death arose in another state, wherein a statute provides that it shall be brought within twelve months from the time of the death, but if the action has been commenced within the stated time and abates or is not decided upon its merits, and another suit is commenced in twelve months thereafter, no part of the first period shall be counted, an objection to an amendment to the complaint in an action brought in our own Courts, upon the ground that it sets up a new cause of action, after the statute had run, by alleging the statute of another state permitting a recovery in actions of this character, when the suit was commenced in the statutory time and the amendment was allowed within the second statutory period: and *Held further*, the objection is untenable under our own decisions. *Renn v. R. R.*, 170 N. C., 128.

APPEAL by defendant from *Long, J.*, at the October Term, 1919, of WILKES.

This action is for the alleged negligent killing of plaintiff's intestate while working in defendant company's coal mine, on Tom's Creek, Virginia, 8 September, 1917.

The allegation of negligence relied on by the plaintiff is that defendant did not furnish a reasonably safe place to work.

The intestate was employed by defendant company as a driver of a mule team in its mines. The teams are hitched to little cars that run on tracks, similar to ordinary railroad tracks, laid along the tunnels, or entries, that lead into the mines. The rails, laid on cross-ties, are 44 inches apart. The mules are hitched to the car tandem, or "spike fashion," and the rear mule walks about six feet in front of the car, being hitched by means of what is called a "tail chain." The mules walk in the middle of the track between the rails. The cars are low and project over the rails on each side from 12 to 18 inches. Against the sides, or ribs, of the entries are piled pieces of slate, small lumps of coal, and other rubbish, in miners' parlance called "gob."

The evidence to prove negligence was largely circumstantial, as no one saw the intestate at the time he was killed.

Russell Anderson, who was nearest to him, testified, among other things, as follows: "I was working for defendant company at Bondtown, Va., 8 September, 1917, at time John Allen Whittington was killed, and knew him, but not very well; I had been there only two or three months. John Allen Whittington was working for defendant company at the time he was killed in what is known as Entry No. 11, Swansea Mine, at Bondtown, Va.; he was driving two mules pulling cars from the rooms; these cars would hold about four tons of coal; on 8 September Whittington was working in Ninth West Swansea, and was on 11 West at the time he was injured, and that he was with him; Whittington was pulling coal for another driver on 11th West; he was driving two mules, one hitched in front of the other—spike fashion; witness knew the mules Whittington was driving, and they were gentle with reference to their working qualities; the lead mule was balky sometimes; at the time Whittington was injured witness was helping a fellow break a mule; that he was about two car lengths from Whittington when he was injured, and a car length is about seven feet; that the injury occurred about as follows: We coupled up the load and started out. A piece of slate slid down off the gob pile. I got off and threw it back, and when I got on the car I did not see him anywhere. I hallowed at John and he did not answer, and then I heard him groan. Neither of the mules balked at the time of the injury. The mules had not stopped. Whittington was striking the lead mules across the back with a strap. I don't know why. On 8 September, at the time Whittington was injured in Entry No. 11, slate and gob stuff was on the outside of the rail stacked up like a wall; ties, props and things like that were lying across the road; slate piled up along the road; could not pass a car in some places; had to climb over; do not know that the

track had been recently relaid in this entry. Whittington died from the injuries. When the mules are walking along in the middle of the track, as they were on this occasion, there is two or three feet open space along by the side of the mule and the rail, and all that is kept clear in order that the cars will not wreck. Don't know why the props along the side of the entry; to hold the slate up, I guess. Laying along the road; sticking out and laying out everywhere—slate piled around there; props were along the side of entry, two props where he was killed. The two props which looked like they had been set for the purpose of putting a collar on one time; had some slate or gob around them down next to the bottom just about as high as the car is. Had to climb over the top to see what was the matter."

S. M. Mullins testified: "The entry was near the point where he was injured in pretty bad condition; they had some slate there, some slack and some rubbish timber; rotten timber; little old rotten timber; something like rotten timber anyway, maybe two or three pieces there. The slate was on the side of the track, on the right-hand side. I never noticed the left-hand side of the track, the right side, the brake side, was the gob and some timbers; there was not sufficient room along the entry where the deceased was injured for him to have walked between the outside of the rail and the walls of the entry. The entry in order for a driver to discharge his duties in safety should be clear for him to get off to catch the brake if something should happen, for him to work in safe condition between the car and the rib. The deceased was lying on his face and belly under the car; his head was closer to the right-hand rail as you go up than to the left-hand rail; his head was in the direction of the rear of the trip, and his feet towards the mules. The entry should be in good shape that the driver could get off, set his brakes if something should happen, the mules fall down, or something happens to keep from killing the mule, and that is for the protection of the mules. On a level track where the grade is practically level, and the cars will not run without being pulled, and the driver's place is on the front end of the car, I would want the side of the track outside of the rail to be clear; it looks like it should be clear; sometimes if the track is level you want to set the brake provided you want to hook the mule up for something to keep the mule from pulling the car."

W. W. Nelton testified: "The entry at the place where we found him in the car was pretty well gobbed up, slate and gob on each side of the car; there was no room for a person to have walked between the outside rail and the rib; there was slate and dirt and a few rotten timbers. I have worked off and on in the mines for the last 12 years. In order that the driver may perform his duties with ordinary safety I should think the entry should be clear, should be clean between the rib and rails

along so that if an accident should happen you could have room to get in the clear. There was a space of 12 or 14 inches on either side of the rail that was free of gob."

A. B. Baldwin testified: "The condition of that entry at that time at the place we found him under the car was very bad, in very bad shape. The entry of the heading had been driven about 12 feet wide, the regular width; the track was laid a little to one side of the entry, a little more to one rib than to the other, and the slate had fallen from the top and had been cribbed up on one side of the tracks on the right-hand side of the car, going up facing the cars you could pass around the cars if the cars were standing still; on the other side the track was close to the rib, and there were some slate and timbers close to the track between the car and rib. There was not sufficient room on either side of the cars between the outside of the rail and the rib of the entry at the point of accident for a person to walk or pass in safety while the cars were in motion; if the car was standing still you could pass the car very well. I have had 14 years experience as a miner in the mines. In order for a driver to perform his duties with a reasonable degree of safety I think the entry should be kept clear of all rubbish and sufficient distance from the car for a man to pass through at any place along the entry. On all entries he has generally from 14 to 18 inches on the outside of the rail to walk on. That space is supposed to be free from obstruction; I have been timber man in the mines a good deal, and never allowed to set timbers within closer than 18 inches of the track."

Horace Turpin testified: "The place where he was under the car was a pretty close place, the rib was pretty close. At some places there was sufficient room between the outside rail and the rib or wall of the entry for a party to pass between a moving car with safety; at the place where we got him from under the car it was not, because it kinder turned down hill. There was a lot of gob there by the side of the rib close to the track. I have been working in the mines two or three years. The entry, in order for a driver to perform his duties with reasonable safety, ought to be clear; I think it ought."

There was a motion for judgment of nonsuit, which was overruled, and defendant excepted.

The jury returned a verdict in favor of the plaintiff, and from the judgment pronounced thereon the defendant appealed.

Bowie & Austin for plaintiff.

L. A. Nuckols, F. B. Hendren, and F. A. Linney for defendant.

ALLEN, J. The principles of law discussed before us are simple, and the only difficulty is in their application to the evidence.

The courts of Virginia and of this State are in perfect harmony as to the duty of the employer to provide a reasonably safe place for the employee to work, as is shown by the opinion of the Virginia Court in *Trotter v. R. R.*, 98 S. E., 623, in which it is said: "It is one of the nonassignable duties of the master to use due care to furnish the servant a reasonably safe place in which to work, and reasonably safe tools and utensils with which to work, and if he fails to do so he is liable to the servant for injuries proximately resulting to such servant from such failure," and by the opinion in *Clements v. Power Co.*, 178 N. C., 55, as follows: "The rule is well established that the duty imposed upon the employer to provide a reasonably safe place to work, and reasonably safe tools and appliances, is nondelegable."

The authorities are also ample to sustain the position of the defendant that evidence which merely makes it possible or does no more than raise a conjecture or suspicion of the fact alleged ought not to be left to a jury (see *S. v. Vinson*, 63 N. C., 335; *Brown v. Kinsey*, 81 N. C., 245; *Byrd v. Express Co.*, 139 N. C., 273; *Lewis v. Steamship Co.*, 132 N. C., 904, and other cases), and it is equally well settled that negligence may be proven by circumstantial evidence, and that "if the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not." Shear. & Red. on Neg., sec. 58, approved in *Fitzgerald v. R. R.*, 141 N. C., 535; *Henderson v. R. R.*, 159 N. C., 583.

The question therefore raised by the motion for judgment of nonsuit is whether there is evidence which renders it probable that the entry or tunnel where the intestate was required to work was unsafe, and that this caused his death.

The tunnel or entry was twelve feet wide. A railroad track ran near the middle of the tunnel, the rails being 44 inches apart. The cars projected beyond the rail 12 or 14 inches on each side. This condition left a space of about three feet on each side between the cars and the sides or walls of the entry for the use of the employees of the defendant, but this space was not left open.

One witness testified: "The slate that we call 'gob' was piled up like a wall, along under the roof outside the railroad between the rail and the rib. There was a space of 12 or 14 inches on either side of the rail that was free of gob."

Another witness: "The condition of that entry at that time at the place we found him under the car was very bad, in very bad shape. There was not sufficient room on either side of the cars between the outside of the rail and the rib of the entry at the point of accident for a person to walk or pass in safety while the cars were in motion. In order for a driver to perform his duties with a reasonable degree of

safety I think the entry should be kept clear of all rubbish and sufficient distance from the car for a man to pass through at any place along the entry."

Another: "Slate and gob stuff was on the outside of the rail stocked up like a wall; ties, props and things like that were lying across the road; slate piled up along the road; could not pass a car in some places, had to climb over."

Another: "The entry at the place where we found him in the car was pretty well gobbed up, slate and gob on each side of the car; there was no room for a person to have walked between the outside rail and the rib; there was slate and dirt and a few rotten timbers. I have worked off and on in the mines for the last 12 years. In order that the driver may perform his duties with ordinary safety I should think the entry should be clear, should be clean between the rib and rails along so that if an accident should happen you could have room to get in the clear."

There is evidence favorable to the defendant, but on a motion for nonsuit we must not only accept the evidence of the plaintiff as true, but he is also entitled to have every reasonable inference considered in his favor, and, so dealing with the evidence, it is shown that the space of three feet between the cars and the ribs or sides of the entry, provided for the use and safety of the employees, was closed except as to 12 or 14 inches, and this small space was covered with debris; that the conditions were bad and dangerous, and it is a reasonable inference that the deceased tried to walk on the outside of the rails and stumbled and fell, or that he was forced between the rails by the conditions on the outside, and was there struck by the cars and run over and killed, and in either event the defendant would be liable, without regard to the particular way in which he met his death, in the absence of contributory negligence, which is not relied on.

We are therefore of opinion the motion for judgment of nonsuit was properly overruled.

The defendant also relies on the plea of the statute of limitations of one year, based on the following facts:

The deceased was killed 8 September, 1917, and this action was commenced on 3 June, 1918. The plaintiff did not allege in the original complaint the statute of Virginia giving a right of action for wrongful death, but was allowed to amend and so allege, more than one year after, and within two years of the death.

The defendant contends that this amendment does not relate back to the commencement of the action, and is the equivalent of a new action, but it was held otherwise in *Renn v. R. R.*, 170 N. C., 128, and if this was not true, the Virginia statute puts the matter at rest. It provides

that actions for wrongful death "shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death, but if any such action is brought within said period of twelve months after said party's death, and for any cause abates or is dismissed without determining the merits of said action, the time said action is pending shall not be counted as any part of said period of twelve months, and another suit may be brought within the remaining period of said twelve months, as if such former suit had not been instituted," so that if the amendment be treated as a dismissal of the first action and the institution of a new one, the latter was commenced within twelve months of the first, and it within twelve months from the death, which brings it clearly within the statute, and the action is not barred.

No error.

KERR GRAIN AND HAY COMPANY v. MARION CASH FEED COMPANY.

(Filed 2 June, 1920.)

1. Attachment—Statutes—Domestic Corporations—Appeal and Error—Findings.

An attachment against the property of a domestic corporation, within the jurisdiction of the court, may be issued if none of its officers can be found in this State after due and dilligent search, Rev., sec. 957, when this fact exists at the time of its issuance, and the finding by the court thereof, on legal evidence, is conclusive on appeal.

2. Vendor and Purchaser—Contracts—Breach—Evidence—Questions for Jury.

The defendant alleged a counterclaim for damages for the unreasonable delay of the plaintiff in delivering merchandise under the contract sued on, and there was evidence tending to show that this delay was not unreasonable, and that it was caused by the failure of defendant to pay for other merchandise, shipped under the contract, as he was thereunder obligated to do. *Held*, judgment on the verdict in plaintiff's favor will not be disturbed.

3. Vendor and Purchaser—Contracts—Compromise—Evidence—Damages.

Where the verdict and purchaser have compromised their differences under their contract, and have agreed upon a new contract in its place, any custom as to shipping instructions relevant only under the original contract are irrelevant to the action of the vendor thereafter brought to recover the purchase money, and to a counter claim by the purchaser for damages for the alleged breach by the vendor.

4. Instructions—Evidence—Peremptory—Verdict Directing.

Where the parties to an action substantially differ as to the essential facts in controversy, but the evidence is practically one way in regard

to them, a charge of the court to the jury is proper, that if they found the facts to be as stated in the testimony of the witness, they should answer the issue as indicated in the charge, leaves the credibility of the witnesses to the jury, and is not objectionable as being peremptory or directing a verdict.

5. Costs—Personal Expenses—Judgments.

A successful litigant is not generally entitled to his personal expenses incurred in prosecuting his action.

CIVIL ACTION, tried before *Ray, J.*, and a jury, at January Term, 1920, of McDOWELL.

The action was brought to recover damages for a breach by defendant of contracts with plaintiff, by which the latter agreed to sell and deliver hay and beans to the defendant. The case was tried upon issues submitted by the court which the jury answered in favor of the plaintiff, assessing the damages at $2,255.87. There was evidence that, when the first contract was made, there was some delay in shipping out the hay, the excuse given by the plaintiff being that the defendant had not paid for the hay already received by him. The defendant was furnishing hay to the Government, and reported the failure of plaintiff to ship the hay to him promptly as the reason for his delay in shipping the hay under his contract with one of the departments, which then ordered the plaintiff to make the deliveries on pain of forfeiting its license. There was controversy between the parties, as to the matters of difference between them, until, on 15 November, 1918, a new contract was made, by which plaintiff agreed to ship immediately 35 cars of hay to the defendant; which was done, but the arrival of the last thirteen cars was somewhat delayed, and defendant refused to accept the same. The hay in the thirteen cars was afterwards sold and the proceeds of the sale credited on the amount then owing to the plaintiff. An attachment was issued at the request of plaintiff, who had brought this action to recover the debt which the defendant owed to him, and the warrant was levied on the hay, the allegation being that "defendant is a domestic corporation, none of whose officers can be found in this State after due and diligent search," that being one of the grounds upon which an attachment may be issued under Rev., 957. The judge found, upon evidence, all of the facts necessary to authorize the attachment in favor of the plaintiff, and among other findings, that there was no officer of the defendant to be found in this State after due and diligent search. The court entered judgment upon the verdict, and directed that the attached property be sold to pay the same. Defendant excepted and appealed.

C. F. Gates and Pless, Winborne & Pless for plaintiff.
Councill & Yount and Morgan & Chambers for defendant.

WALKER, J., after stating the case: It appears that the defendant was unable to pay for the goods, which it had bought from the plaintiff, and this was really the cause of the controversy between the parties. There is very little else of merit in the case. If the defendant had been solvent, and had met its obligations with reasonable promptness there seemingly would have been no trouble and no reason for this litigation.

1. There was no sufficient reason shown for vacating the attachment which was issued properly upon the facts as found by the court. We are concluded by these findings. *Millhiser v. Balsley,* 106 N. C., 433. The case of *Barnhardt v. Brown,* 118 N. C., 701, has no application, as it relates to the service of summons on an officer, or agent, under laws of 1889, ch. 108. The facts upon which the ruling of the judge was based, were those existing at the time the attachment was issued, and they were the only facts that should have been considered by him. *Devries v. Summit,* 86 N. C., 126.

2. The exceptions, twelve in number, as to the custom requiring shipping instructions to be given within four days after demand by the shipper, has become immaterial, as the contract was changed, and a new one substituted by compromise and agreement of the parties. There is no material disagreement as to the facts. The delay in forwarding the hay and beans, as the evidence clearly shows, was not an unreasonable one in view of the situation and circumstances, and besides, it clearly appears that the alleged delay in shipping the hay and beans was not the real cause of the defendant's failure to settle with the plaintiff, but the lack of funds. Defendant had not paid the draft attached to the bills of lading, so as to take up the latter and present them to the carrier.

3. As there was substantial difference between the parties as to the essential facts, and, as the evidence was practically one way in regard to them, it was not error to instruct the jury that, if they found the facts to be as stated in the testimony of the witnesses, they should answer the issues as indicated in the charge. *Gaither v. Ferebee,* 60 N. C., 303; *Wetherington v. Williams,* 134 N. C., 276. The charge was not a peremptory one, and the verdict was not directed. The credibility of the witnesses was left to the jury.

4. But we think the item of expense amounting to ninety dollars should be eliminated, and it is so ordered, as there is no right, in law, to make such a charge against the defendant.

As thus modified the judgment is affirmed.

Modified and affirmed.

N. A. HALL v. GIESSELL AND RICHARDSON.

(Filed 2 June, 1920.)

1. Principal and Agent—Evidence—Scope of Agency—Benefits Accepted —Ratification—Trials—Nonsuit.

Where there was evidence tending to show that the plaintiff, a shopkeeper, had, under contract with defendant's agent or superintendant, furnished for a year or more the employees of defendant merchandise from his store on the superintendent's order, with monthly statements thereof, which were paid promptly, excepting for the last statement, the subject of the action, which defendant refuses to pay on the ground of the lack of the superintendent's authority to make the contract as his agent; that the contract of agency was in writing and of limited authority, of which there is no evidence that the plaintiff had notice or knowledge; *Held*, sufficient to be submitted to the jury upon the question of the agent's express or implied authority, or of ratification of his acts by the defendant in knowingly accepting the benefits thereunder for such period of time, under the circumstances.

2. Evidence— Written Instruments— Parol Evidence— Collateral Transactions— Pricipal and Agent— Benefits Accepted—Ratification—Admissions.

Where a written instrument, a mortgage in this case, is merely collateral to the substantial cause of action and not between the parties, and there is evidence that the defendant received a benefit thereunder and it tends to show his implied admission of liability for the cause of action, his objection to parol evidence to show the transaction on the ground that the written instrument is the best evidence, is untenable, and it makes no difference that it may have been taken in the name of another, if it was really for the benefit of the defendant.

3. Appeal and Error—Objections and Exceptions—Instructions—Contentions.

Objection to the manner in which the trial judge has stated the contentions of the complaining party should be made at the time, to avail him of his exception on appeal.

4. Issues—Appeal and Error—Trials.

It is not error for the trial judge to refuse issues tendered, if those submitted to the jury are sufficient to embrace every essential question in dispute between the parties and for them to present every material phase of the case.

5. Instruction—Prayers for Instruction—Appeal and Error.

When the trial judge substantially gives requested instructions, in his own language, in his general charge, without thereby weakening their effect, it is sufficient, for he is not required to give them in their exact language.

CIVIL ACTION, tried before *Bryson, J.*, and a jury, at March Term, 1920, of SWAIN.

The plaintiff Hall was a country merchant, and the defendants were operating a large sawmill near his store.

In September, 1917, plaintiff entered into an agreement with defendants, through their agent or general superintendent, W. A. McGee, to furnish merchandise to certain employees of the defendants, it being a part of the agreement that only such employees should be furnished as received orders from the company or its representative, and that the plaintiff should present statements on the first of each month, covering the amounts furnished to the employees.

The plaintiff, under this agreement, furnished supplies to defendants' employees from September, 1917, up to the first day of November, 1918, making statements on the first day of the month, the amounts of which were promptly paid by defendants.

On the first day of November, 1918, plaintiff prepared his usual statement amounting to $650.33, and delivered it at defendants' office. A few days later, defendants' bookkeeper informed plaintiff that the statement had been misplaced, and requested a duplicate, which was furnished. The defendants made no objection to any item charged on this statement, but refused to pay the same on the ground that the plaintiff had furnished these supplies without proper orders. There was no denial of the facts by defendants that the parties receiving the supplies were in their employ, and that the supplies were such as the employees required in order to carry on the work of the defendant company. It was not denied that W. A. McGee was the superintendent of the defendants in charge of their lumber operation during the period of time these supplies were furnished, but defendants contended that McGee only had limited authority, his contract being in writing. It was not shown on the trial that the plaintiff Hall had any notice of the terms of this contract. The plaintiff testified on the trial that he had furnished the supplies included in this account, upon the express order of W. A. McGee, and only furnished supplies to such employees as McGee directed.

The jury answered the issues in favor of the plaintiff, and from the judgment on the verdict the defendants appealed.

S. W. Black for plaintiff.
Frye & Frye for defendants.

WALKER, J., after stating the facts as above: There are many exceptions in the record, but a careful analysis of them will show that there are really a very few which need to be considered, because they substantially present all the essential objections taken during the trial, and cover all the matters appearing in the assignments of error. The main

question was whether the superintendent, W. A. McGee, had the authority to make the contract with the plaintiff, and if not, whether the contract was afterwards ratified by the defendants with full knowledge of the fact that he had exceeded his authority and as to what he had done. These questions were submitted to the jury by the judge with full and correct instructions, and the jury found either that McGee had the express authority, or that if he did not have it, and had acted either without it, or in excess of it, the defendants, with knowledge of what had been done by him, had freely ratified it. The court gave clear instructions as to what, in law, would constitute authority in McGee to represent the defendants, and make a binding contract with the plaintiff in their behalf, and also explained fully what was required to hold the defendants liable under the contract by their ratification of it. There was ample evidence to support the charge. Among other things, it was shown that the account ran from September, 1917, to November, 1918, and that at the first of each month the bill for the month before was presented and promptly paid, until the final statement for $650.33 was presented and held up. It would be very strange if defendants did not know of these transactions each month, and inquire of McGee why he was paying these bills with such regularity and under what contract or understanding with the plaintiff. If the defendants were at all watchful of their interests and diligent in the prosecution and management of their business, they would have ascertained why McGee was making these monthly payments, and, if he did not have authority from them to thus trade with the plaintiff, and was acting without authority or in excess of his authority, they would certainly have made earlier complaint. The jury had the right to consider this and the other evidence bearing upon the question, and particularly the Callahan mortgage transaction, and the evidence as to what was said by the defendant Richardson. The conclusion of the jury was not against the weight of competent and relevant testimony to show the authority of W. A. McGee, which he professed to have, or ratification if he did not have it. The parol evidence objected to by the defendants was competent, as the transaction to which it relates was collateral to the issue in this case. This action is not upon the mortgage or the debt it secured, but the evidence was offered to show by the dealings with respect to the mortgage an admission of liability by the defendants for the debt which is the subject of this action. Greenleaf on Evidence, 275, 279, and 366; *Pollock v. Wilcox,* 68 N. C., 46; *Carden v. McConnell,* 116 N. C., 875, and *Ledford v. Emerson,* 138 N. C., 502, where it was held that the parol evidence rule, as to the contents of a written instrument, applies only to actions between parties to the writing, and when its enforcement is the substantial cause of action. The plaintiff in this case does not seek to

enforce any right under the mortgage, but merely to recover a personal judgment against the defendants for a debt due to him. It was also competent to show that the defendants were receiving benefits under the Callahan transaction, and that it was executed practically to indemnify them against any loss on account of the plaintiff's debt. This evidence tended to show that the defendants' conduct, with reference to the Callahan mortgage, was, at least, an implied admission of their liability for the debt in suit. It is held even that a party may be estopped by receiving benefit under a contract to deny its validity, and his liability under it. *Sprunt v. May,* 156 N. C., 388; *McCracken v. R. R.,* 168 N. C., 62; *Watson v. Mfg. Co.,* 147 N. C., 469. It makes no difference that the mortgage may have been taken in the name of W. A. McGee if it was really intended for the benefit of the defendants. *Watson's case, supra,* at pp. 474-5. One who relies on a contract made for his benefit by another, who assumes to act as his agent, is not allowed to accept benefits under the same, and at the same time repudiate the agency, and in this way avoid the burdens. *Sprunt v. May, supra; McCracken v. R. R., supra.*

There was sufficient evidence in this case for the jury to find that W. A. McGee had entire charge and control of the defendants' mill and its operation, and was clothed with sufficient authority, as defendants' agent, to make the contract with the plaintiff within the principle declared in *Watson v. Mfg. Co., supra,* as stated in the fifth head-note, and more specifically in the opinion of the court, and the jury found that he did have the requisite authority, or that defendants had ratified what he did. It is not open to the defendants now to allege that the supplies furnished to the hands were of no benefit to the defendants. The evidence really shows that they were, and the jury, under the charge of the court must have found that they were.

There are objections to the manner in which the contentions of the parties were stated to the jury, but they come too late, as we have often held in similar cases, the following being the most recent ones: *S. v. Spencer,* 176 N. C., 709; *Bradley v. Mfg. Co.,* 177 N. C., 153; *Sears v. R. R.,* 178 N. C., 285.

There are exceptions to the submission of the issues and to those tendered by the defendants, which were rejected by the court. The issues submitted were sufficient to embrace every question in dispute between the parties, and for the parties to present every material phase of the case, and this being the case, an objection to it is groundless. *Patterson v. Mills,* 121 N. C., 258; *Warehouse Co. v. Ozment,* 132 N. C., 848; *Hatcher v. Dabbs,* 133 N. C., 239; *Pretzfelder v. Ins. Co.,* 123 N. C., 164.

The judge charged correctly as to the notice that he had been given not to furnish any more supplies without an order, so this was a question for the jury, and the matter, as to the $100 instruction in the sale of the goods received the same treatment from the court.

The question raised as to the statute of frauds was properly explained to the jury by the judge in his charge.

The judge charged sufficiently, and quite fully, as to the burden of proof, and responded to the requests for instructions, so far as the defendants were entitled to have him instruct the jury. The charge covered the case, in every feature of it, and was full, clear and precise, and if there was no direct and specific response to the requests for instructions, those which were proper will be found substantially given in the general charge. The judge was not bound to use the language of counsel but was at liberty to choose his own if the request was given in substance, and its force not weakened by a change in phraseology. *Graves v. Jackson,* 150 N. C., 383. It is well settled that the failure to give instructions tendered by a party is not error, if they have been substantially covered by the general charge. *S. v. Baldwin,* 178 N. C., 693. The motion to nonsuit was properly refused, as there was sufficient evidence to be considered by the jury. The case in its full development, really resolved itself finally into a question of fact. The simple principles of law arising upon the evidence were correctly explained and applied to the case, and the jury, as to the facts, accepted the plaintiff's version.

There are so many exceptions, that it would be a work of great labor, and accomplish no good purpose, to consider them in detail. When they are considered, and properly classified, they may be greatly reduced in number, and scope, as they have taken a wide range. This process of classification and reduction we have undertaken, and have attempted to confine ourselves to the salient points made by the learned counsel for the defendants in his brief, and able argument before us. The presiding judge, we think, tried the case well and without a flaw.

No error.

J. C. HERBERT, WILLIAM FESSENDEN, ET AL. v. THE UNION DEVELOPMENT COMPANY AND THE TELASSIE POWER COMPANY.

(Filed 2 June, 1920.)

1. State's Land—Grants—Secretary of State—Statutes—Change of Grantee.

The power conferred upon the Secretary of State by ch. 460, Laws of 1889, now Rev., sec. 1741, to correct errors in grants of State's land, by supplying omissions, or correcting the names of grantees, material words or figures, etc., confers on him only a ministerial authority and not a judicial power, which is vested in the courts by our constitution, art. 4, sec. 2; and his change of the name in the grant from one person to another, by name, is in effect to declare the former a trustee of the latter, or his heirs at law, under a grant obtained by fraud or mistake, etc., and within the exclusive jurisdiction of the courts, and the action of the Secretary of State therein is void.

2. Same—Deeds and Conveyances—Trials—Pleadings—Evidence—Appeal and Error—Objections and Exceptions.

Where in an action involving title to lands, the defense, throughout the trial, is the validity of a State's grant under which the defendant claims, and there is also allegation denied, that the title had been conveyed to him by the plaintiff, but the deed, etc., was not put in evidence and his motion to nonsuit has been erroneously sustained by the trial judge solely upon the ground that the grant under which he claimed was a valid one, and on appeal the defendant has assigned no error therein: *Held*, the Superior Court could not have determined the question of the defendant's title under the deed of plaintiff, as alleged; and a new trial will be ordered for the error of the judge in sustaining as valid the grant, the source of defendant's title.

CIVIL ACTION for removal of cloud upon title, tried before *Ray, J.*, at the Fall Term, 1919, of CLAY, and from a judgment of nonsuit entered at the close of the plaintiffs' evidence, the plaintiffs duly excepted and appealed to the Supreme Court.

M. W. Bell and Witherspoon & Witherspoon for plaintiffs.
Johnston & Horn and S. W. Black for defendants.

BROWN, J. The plaintiffs are the heirs at law of W. H. Herbert, and also of E. Herbert, who was the father of W. H. Herbert.

From the evidence introduced, it appears that in the year 1865, State Grants Nos. 2865, 2866, 2868, and 2869 issued from the State to W. H. Herbert as grantee of the lands described therein, which lands were situated partly in Clay County and partly in Macon County. It further appears that on 20 April, 1890, Octavius Coke, Secretary of State, struck out the name of W. H. Herbert from the record of registration of said grants in the office of the Secretary of State and inserted the

name of E. Herbert therein as grantee and made the following entry on the registration of these grants, "Corrected by virtue of authority given by laws of 1889, Chapter 460. This 20 April, 1891, Oct. Coke, Sec. State." His Honor held that the plaintiffs, having introduced evidence connecting their title with W. H. Herbert, and not having connected with E. Herbert, had failed to establish a *prima facie* title to the lands in controversy. Chapter 460, Laws of 1889, is now sec. 1741 of the Revisal of 1905.

His Honor held that the action of the Secretary of State in striking out the name of W. H. Herbert in the grant and substituting therefor the name of E. Herbert, was a valid exercise of power under the statute. Sec. 1741, reads as follows:

"Errors in grants, how corrected. If in issuing any grant the number of the grant or the name of the grantee or grantees or any material words or figures suggested by the context has been omitted or not correctly written or given, or the description in the body of the grant does not correspond with the plot and description in the surveyor's certificate attached to the grant, or if in recording the grant in his office the Secretary of State has heretofore made or may hereafter make any mistake or omission by which any part of any grant has not been correctly recorded, the Secretary of State shall, upon the application of any party interested, and the payment to him of his lawful fees, correct the original grant by inserting in the proper place the word or words, figure or figures, name or names omitted or not correctly given or suggested by the context; or if the description in the grant does not correspond with the surveyor's plat or certificate, he shall make the former correspond with the latter as the true facts may require."

These grants, which are the subject of controversy and under which the plaintiffs claim, were issued in 1865 to W. H. Herbert, and his name stricken out and the name of E. Herbert inserted in 1890 by the Secretary of State without any notice to these plaintiffs, who are the heirs at law of W. H. Herbert, as required by sec. 1742, which is applicable to lands in Macon and Jackson counties. These lands are situated partly in Macon and Clay counties, and it seems would come within the purview of the statute, but independent of this lack of notice, we are of opinion that the Secretary of State had no power whatever to strike out the name of the true grantee to whom the grants were issued and insert the name of another to whom the grants were never issued. It seems to be very clear that the statute does not purport to confer judicial powers upon the Secretary of State even if it could. We think it is manifest that the purport of the statute was to provide a method of correcting, upon due notice, clerical errors in grants which had been issued. It is not denied that the grants were issued to W. H. Herbert;

it is claimed that the entries were made by E. Herbert, and that he paid the purchase money to the State and took out certificates of survey in his own name, but that for some reason the grants were issued in the name of W. H. Herbert, his son. It is claimed in the brief of the counsel for the defendant that the grants were issued to W. H. Herbert by mistake or fraud. If that is so, it is not a clerical error or mistake, such as comes within the purview of the statute. No judicial powers are conferred upon the Secretary of State, and it would require the exercise of judicial authority to correct the grants. This judicial authority under our Constitution is vested in a court for the trial of impeachment, a Supreme Court, Superior Court, courts of justices of the peace, and such other courts inferior to the Superior Court as may be established by law. Art. IV, sec. 2, Constitution.

If the grants were wrongfully issued to W. H. Herbert, either by mistake or fraud, the wrong could only be corrected by an action in the Superior Court seeking to convert W. H. Herbert or his heirs at law into a trustee for the use and benefit of E. Herbert or his heirs at law. In substituting the name of E. Herbert for W. H. Herbert, the Secretary of State exceeded his authority under the statute, and his act is therefore invalid.

It was contended upon the argument by the learned counsel for the defendant, Mr. Johnston, that the plaintiffs had conveyed all their interests in these lands to R. L. Herbert by deed executed by John C. Herbert and his wife, and by John C. Herbert for his coplaintiffs by virtue of the power of attorney. We find upon examination of the record that this allegation is made in the answer of the defendant, and the power of attorney and deed is set out specifically in the answer. This allegation is denied in sec. 2 of the plaintiff's replication. This power of attorney and deed were not introduced in evidence. The defendant, at the close of the plaintiff's evidence, moved for judgment of nonsuit upon the ground substantially that the action of the Secretary of State hereinbefore recited was valid, and that title to the land had never vested in W. H. Herbert. This motion was allowed. Thus it appears that the court below never passed upon the contention of the defendant in respect to the said conveyance. This is manifest, because there is no assignment of error pointing thereto.

New trial.

J. B. DAVIS v. KESSAWAYNE LUMBER COMPANY.

(Filed 2 June, 1920.)

New Trials— Negligence— Release— Fraud—Undue Influence—Evidence —Trials.

Where there is evidence tending to show that a release for damages for a personal injury, the subject of the action, had been procured by the defendant from the plaintiff by fraud and undue influence, a holding that there was no evidence of this character by the trial judge constitutes reversible error. The Court does not discuss this evidence as a new trial is ordered.

APPEAL by plaintiff from *Finley, J.*, at February Term, 1920, of HAYWOOD.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant.

The defendant filed answer denying negligence, and setting up as a defense a release executed by the plaintiff.

The plaintiff replied, alleging that the execution of the release was procured by fraud and undue influence.

At the conclusion of the evidence his Honor held that there was no evidence of fraud and undue influence, and entered judgment of nonsuit, and the plaintiff excepted and appealed.

John M. Queen and Felix E. Alley for plaintiff.
Martin, Rollins & Wright for defendant.

ALLEN, J. There is evidence tending to establish the contention of the defendant that the release was a fair and just settlement of the claim of the plaintiff, but we cannot say, after an inspection of the whole record, that there is no evidence, direct or circumstantial, of fraud or undue influence, and being of the opinion that there is some evidence fit to be considered by the jury, a new trial is ordered, without intimation or expression of opinion as to the weight of the evidence.

We refrain from discussing or setting out the different circumstances, because if we did so undue importance might be attached to those referred to, and the question ought to be tried before the jury free from any expression of opinion, real or apparent, by us.

A new trial is ordered.

New trial.

GEORGE H. PALMER v. J. F. PALMER AND WIFE, LOU PALMER.

(Filed 2 June, 1920.)

Evidence—Attorney and Client—Argument to Jury—Absence of Client—Appeal and Error.

The conduct of counsel in presenting their case to the jury is largely in the control and discretion of the trial judge; and in the trial of a civil action, which does not require the presence of a party, the attorney for his side of the controversy may not, as a matter of right, argue to the jury why his client had not been present during the trial, there being no evidence of the fact upon which to base it.

CIVIL ACTION, tried before *Bryson, J.*, at January Term, 1920, of HAYWOOD, upon the following issues:

"1. Did the defendant wrongfully and unlawfully burn and destroy the property of the plaintiff, as alleged in the complaint? Answer: 'No.'

"2. What damage, if any, is the plaintiff entitled to recover?"

Plaintiff appealed.

Morgan & Ward, W. J. Hannah, and Felix E. Alley for plaintiff.

G. S. Ferguson, John M. Queen, Grover C. Davis, and J. Bat Smathers for defendants.

BROWN, J. This action was brought to recover damages of the defendant, J. F. Palmer, for wrongfully, unlawfully, and feloniously setting fire to and destroying an outhouse containing certain personal property belonging to the plaintiff. The question involved seems to be almost exclusively a matter of fact. There are three assignments of error, two relating to evidence and one to the action of the court in not allowing counsel for the plaintiff to argue before the jury why the defendant, Frank Palmer, was not in attendance upon the court at the trial.

We find no merit in either assignment of error. This is a civil action, and the defendant was not required to be present in court. It was admitted in open court that the defendant Frank Palmer was not present, but there was no evidence whatever as to why he was not present. Counsel could not be allowed in his argument to give reason for the defendant's absence when no evidence had been introduced tending to prove why he was absent.

Counsel cannot be allowed to argue facts before a jury which are not disclosed by the evidence, and the conduct of counsel in presenting their client's case to the jury is largely in the control and discretion of the trial judge. *Irvin v. R. R.*, 164 N. C., 5; Cyc., 1471.

No error.

MARY S. ECTOR v. R. E. OSBORNE ET AL.

(Filed 2 June, 1920.)

1. Usury—Waiver—Statutes.

Statutes prohibiting charging usury or an illegal rate of interest are enacted for the benefit of the borrower who may waive his right thereunder. Rev., sec, 1591.

2. Same—Judgment—Consent.

By consent judgment entered in an action upon a note, wherein usury was set up by the defendant, and the parties have agreed upon a compromise in a certain sum, signed and entered by the court, the defendant waives his right under our usury law, and may not thereafter maintain the defense that a note he had given the plaintiff, in the amount of the judgment, was tainted with the usury of the first transaction.

3. Usury—Definition.

There are four requisites to an usurious transaction: a loan express or implied; an understanding between the parties that the money lent shall be returned; there shall be a greater rate of interest than allowed by law paid or agreed to be paid, and a corrupt intent to charge the usurious rate, such intent consisting in knowingly charging or receiving excessive interest with the knowledge that it is prohibited by law; and it appearing in this case that the plaintiff, though induced by defendant to make the loan under a pretext of friendship, knowingly accepted the latter's note with usurious interest included, the transaction comes within the definition of usury.

CLARK, C. J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendants from *Bryson, J.,* at the January Term, 1920, of HAYWOOD.

This is an action on a note for $500 executed on 9 May, 1916, by the defendant Osborne to the defendant Abel, and indorsed by Abel to the plaintiff, to which the plaintiff interposes the plea of usury, alleging that the note was given for the balance of a loan of $1,000 on which usurious interest was charged, and that if the payments made are applied to the loan without interest nothing is due the plaintiff.

The plaintiff in her testimony gave the following account of the original loan: "I loaned Mr. Osborne, on 5 March, 1908, $1,000. Mr. Osborne was connected with the bank down here and he was building a handsome home at Hazelwood, and he came to me a time or two—he knew I had a little money in the bank—and under the pretense of friendship told me he thought I might make a little more than I was in the bank, and he needed some money, and under this pretense I loaned him $1,000. At his suggestion a note was written and given to me for $1,080. Let him have $1,000. The $80 represented the interest for the following year; Mr. Osborne suggested that that be put in. Mr. Osborne only got $1,000."

The plaintiff admitted that the defendant paid her interest on the loan for the years 1908 to 1913, inclusive, amounting to $592, and offered evidence that upon his failure to make further payment she brought an action on the note for $1,080, to which the defendant made the same plea of usury as in this action; that this action was by agreement settled and compromised by the elimination of usurious interest and paying six per cent on the loan; that pursuant to the settlement the defendant paid the plaintiff $500, and executed the note sued on in this action, and another note for $100, and that the settlement was approved by the judgment in the former action, which is as follows:

"This cause coming on to be heard at May Term, 1916, of the Superior Court of Haywood County, before his Honor, B. F. Long, judge presiding, and holding said term of court; and it appearing to the court, and the court finding as a fact, that the plaintiff and defendants have settled the debt sued upon and have agreed that the costs be taxed against the defendant, R. E. Osborne;

"It is therefore considered, ordered, and adjudged that the matters and things between the plaintiff and the defendants are compromised, and that R. E. Osborne, one of the defendants, pay the cost of the action to be taxed by the clerk.

B. F. LONG,
Judge Presiding."

This evidence was not contradicted by the defendant. The defendant filed four requests for instructions to the jury, all being predicated upon the idea that the evidence and admissions of the plaintiff showed that the note for $500 sued on in this action was a part of the original loan of $1,000, which was usurious, and therefore did not bear interest, and that as the payments made amounted to $1,092 there was nothing due the plaintiff.

These instructions were refused, and the defendant excepted, and assigned the same as error in the following words:

"6. That his Honor erred in not giving the special instructions to the jury as tendered by the defendants, as shown by defendant's exception No. 7."

There is no exception to the charge. The jury returned the following verdict:

"1. Does the note sued on in this action represent in whole or in part usurious interest charged by plaintiff and paid by defendant on the note for $1,080? Answer: 'No.'

"2. If so, to what extent? Answer:

"3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$500, with interest from date of note, 9 May, 1916, at rate of 6 per cent per annum.'"

Judgment upon the verdict in favor of the plaintiff, and the defendants appealed.

W. J. Hannah and John M. Queen for plaintiff.
Morgan & Ward for defendants.

ALLEN, J. There are four requisites of a usurious transaction:

"(1) There must be a loan, express or implied; (2) an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned." *Doster v. English,* 152 N. C., 341.

"The corrupt intent mentioned in the books consists in the charging or receiving the excessive interest with the knowledge that it is prohibited by law, and the purpose to violate it. Our statute makes it usury if the interest is *knowingly* charged or received at the unlawful rate." *MacRackan v. Bank,* 164 N. C., 26.

Applying these principles, it is clear that the original loan of $1,000 was usurious, and the legal effect of the usury could not be avoided by the execution of a separate note for the interest, or by giving new notes, in renewal of the old. *Ervin v. Bank,* 161 N. C., 47.

A borrower is not, however, compelled to plead usury, and as the defense is personal to him it may be waived.

A case in point is *Berk v. Bank,* 161 N. C., 206, from which we quote at length, because the principle declared covers the question involved in this appeal, and the principle cannot be understood without a statement of the facts.

The Court says in that case: "We find that the main exception relates to the ruling of the court upon the question of usury. Plaintiffs made to J. L. Armfield on 16 May, 1906, their note for $5,500, secured by a mortgage on the property of the partnership, which was duly executed by them and their wives. It appears that they only received $4,500, and, as they alleged, the balance, or $1,000, was usurious interest. While the reference did not find explicitly that the $1,000 was illegal interest, he did find that the plaintiffs came to a settlement with the defendant, or the defendant with them, and the negotiations resulted in an agreement of compromise, which was reduced to writing and the substance of which is that J. L. Armfield agreed to pay and the plaintiffs to receive the sum of $600, and the latter, in consideration of the said sum, released Armfield from any and all liability for and on account of the said usurious transaction, and it is so denominated in the release, being called by circumlocation 'all amounts paid in excess of the legal

rate of interest for any and all money heretofore loaned to (plaintiffs) by J. L. Armfield,' and 'the said excess being $600, and the payment of the same, it is agreed, shall be in full settlement of all liability therefor, and of any and all causes of action which can arise therefrom.' This was undoubtedly an admission of the defendant that the transaction in which he took the note for $5,500 was tainted with usury, and that he was in danger of losing, not only his legal interest on the note, but double the amount in interest which had been paid to him by his debtors. He therefore very prudently and wisely set about to make terms with the plaintiffs, and to relieve himself of this statutory liability, by paying $600 in compromise and adjustment of the whole amount that might have been exacted. 'The statutes of usury being enacted for the benefit of the borrower, he is at liberty to waive his right to claim such benefit and pay his usurious debt, if he sees fit to do so. It is, therefore, held that when the debtor becomes a party to a general settlement of preceding usurious transactions, made fairly and without circumstances of imposition, his recognition of the amount agreed to be due as a new obligation will preclude his setting up the old usury in defense of the new debt. This rule is not held to apply, however, unless it is clear that the debtor has fully accepted the settlement as a just debt separate and distinct from the preceding usurious obligations.' 39 Cyc., 1024. The $600 thus paid to the plaintiffs became their money, and was in no way involved in the account. Its payment in final settlement of the usurious transaction simply purged it of the taint, or eliminated the usurious feature, and reduced the principal to $4,500. That was the new principal, and bore legal interest."

If, as was held, a compromise and settlement followed by the execution of a release purges the transaction of usury, surely the same effect should be given to a compromise and settlement, in which the usury is eliminated, and which is approved by a judgment of the court.

It follows, therefore, that there was no error in refusing to give the prayers for instruction.

We have considered the exception of the defendant, although it is not assigned as error according to our rules, which require the error complained of to be "definitely and clearly presented, and *the Court not compelled to go beyond the assignment itself to learn what the question is. The assignment must be so specific that the Court is given some real aid*, and a voyage of discovery through an often voluminous record not rendered necessary." *Thompson v. R. R.*, 147 N. C., 413, approved in *Porter v. Lumber Co.*, 164 N. C., 396.

If there is an exception to an instruction refused or given, or to the admission or exclusion of evidence, the instruction or evidence should be set out in the assignment, and upon failure to do so the Court may disregard the assignment.

As late as *Wheeler v. Cole,* 164 N. C., 380, approved in *Carter v. Reaves,* 167 N. C., 132, the Court said: "It would not consider exceptions not set out in compliance with the plain requirements of our rules as construed by this Court."

There are several exceptions in the record, which we need not consider, as we rest our decision on facts that are not in dispute.

No error.

CLARK, C. J., dissenting: The defendant, R. E. Osborne, the maker of the note sued on, pleaded usury, and alleged that the note sued on was part of and grew out of a loan of $1,000 made by the plaintiff to him on 5 March, 1908, and that said loan was made on the express understanding and agreement with the plaintiff that the said Osborne pay 8 per cent interest on said loan, and at the time he received from the plaintiff $1,000 in cash and executed his note to the plaintiff in the sum of $1,080. The said $80 was embraced in the said note, being the interest thereon for one year at 8 per cent, which was added to the principal indebtedness. He further averred that he had paid the plaintiff 8 per cent interest on the said loan beginning 5 March, 1908, for a period of 6 years. And also paid the same rate of interest on the $80 representing the first year's interest, making the interest for each of said years $86.40—a total of $598.40 paid to the plaintiff by reason of said usurious contract. The defendant Osborne further averred that he paid the plaintiff by reason of said loan the further sum of $500 in cash, on 9 May, 1916, making a total of $1,098 paid by him on said loan of $1,000.

It appears on the record, and was admitted by all parties, that prior to 9 May, 1916, the plaintiff sued the defendant Osborne and his sureties on the note of $1,080, dated 5 May, 1908, and that after deducting the interest that had been paid the defendant Osborne filed an answer pleading the statute forbidding the collection of more than 6 per cent on loans, and at May Term, 1916, said suit was compromised, and by agreement judgment was signed dismissing the suit. It is admitted by both plaintiff and defendant that at the time of the said consent judgment, 9 May, 1916, the defendant Osborne paid the plaintiff the further sum of $500, which was in addition to the annual payments of interest theretofore made by him to the plaintiff at the aforesaid rate of 8 per cent for seven years, and that at the time of said consent judgment the defendant Osborne executed to the plaintiff the note sued on in this action, endorsed by J. F. Abel, and that he also executed to the plaintiff his note in the sum of $100 without any endorsement.

At the time of the payment of $500 in cash, on 9 May, 1916, and the execution of the said two notes for $500 and $100, there was no con-

sideration passed between the parties, but they were renewal notes of the original loan of $1,000 of 5 March, 1908, less payments made. The defendant Osborne in his answer averred that by reason of said contract, knowingly made by the plaintiff to charge him 8 per cent interest on said $1,000 loan made on 5 March, 1908, in law the said loan never bore any interest, and that the different payments made by him by reason of said loan should be, and by law were, applied on the principal indebtedness of $1,000, and that said payments, together with the $500 cash paid on 9 May, 1916, overpaid the plaintiff, and the note now sued on for $500 represents in its entirety unlawful and usurious interest charged and exacted of him by the plaintiff, and that the same is void. The plaintiff, having already more than received her money back, cannot in law correct the note now sued on.

There is no dispute about the above facts, which are set up in the answer and admitted by the reply, which relied upon the statute of limitations, Rev., 396 (2), in bar of the defendant's right to plead the statute.

The court erred in refusing the defendant's prayer to instruct the jury that the plaintiff having sworn that by virtue of said contract of 5 March, 1908, she had charged the defendant 8 per cent per annum on said loan, and that pursuant to said contract the defendant had paid the plaintiff up to the date on which the plaintiff admits the payment of $500 in cash on 9 May, 1916, the sum of $1,098, the loan as a matter of law bore no interest, and that the defendant had overpaid the plaintiff. And further, that all payments made by the defendant to the plaintiff by reason of said loan were in law applied on the principal; and further, that the note of $500 sued on in this action, according to the plaintiff's statement, represents in its entirety illegal and usurious interest on the original loan, and the defendant having overpaid the original debt, which in law bore no interest, the note now sued on, being for illegal interest on said original loan, the same is void, and that the defendant having pleaded the statute, Rev., 1951, forbidding usury, the plaintiff is not entitled to recover, and further, that in no view of the case is the plaintiff entitled to recover, and if the jury believed the evidence of the plaintiff, it will answer the first issue "Yes"; the second issue, "In its entirety"; and the third issue, "Nothing."

The court refused the above instructions prayed by defendant, and charged the jury that a judgment having been rendered upon the original note, as above stated, the defendant was estopped to set up the defense of usury in this action. This was error both because the judgment did not pass upon the question whether there was usury or not, but the judgment was a consent judgment which is simply an agreement of the parties, and has no effect beyond such agreement. *Bank v. Comrs.*,

119 N. C., 226, where the subject of consent judgments is fully discussed and the Court says: "Consent judgments are in effect merely contracts of parties acknowledged in open court, and ordered to be recorded." Such judgment has the same effect exactly of a contract between the parties, and no more. And this agreement under which the new note for usurious interest was given has certainly no effect greater than if the usury had been paid in cash, and if paid in cash, the defendant was not only not estopped, but was entitled to recover back twice the amount of the interest paid.

Rev., 1951, provides: "The taking, receiving, reserving, or charging a greater rate of interest than 6 per cent per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid, in an action for debt."

If payment in cash had been made, the debtor, instead of being estopped, would have been entitled to recover back double the amount paid. Certainly, therefore, the plaintiff cannot recover on this note, which is given in lieu of cash, since the note on which usurious interest had been paid had been overpaid, after deducting the payments of interest and payment of $500 in cash at the time (9 May, 1916), when the note sued on was given.

In *Faison v. Grandy,* 126 N. C., 827, and cases there cited, the Court held: "A note tainted with usury retains the taint in the hands of a subsequent holder. The forfeiture of interest is the decree of the law, and therefore a note embracing a usurious consideration is void as against the maker, even in the hands of a purchaser before maturity for value and without notice." In the present case the transaction is between the same parties, and the alleged renewal note is liable to the same defenses as if the original note was still outstanding.

This note in its entirety is a promise to pay interest, and void by virtue of the usury statute, there being nothing due upon the original note at the time this note was given.

In *Riley v. Sears,* 154 N. C., 517, the Court said: "In its practical operation, and as a matter of fact, the lender in very little over two years from the time the repayment was to begin, received back his $12,000, and in addition $2,627; so that, if this was a loan, as the parties termed it, he had already received, when these notes now sued on were given, the principal sum and nearly twice the amount of interest allowed by law. These notes, therefore, being given for an additional amount claimed, are based entirely on a usurious consideration, and no recovery

thereon can be had. *Faison v. Grandy,* 126 N. C., 827, and *Ward v. Sugg,* 113 N. C., 489." The present case exactly "on all fours."

The above authority is directly in point, for, according to the plaintiff's own statement, the note sued on in its entirety represents an additional amount, which in its entirety is for usury. The law applied the payments made for the seven years on the principal, since under the statute the note bore no interest, and the additional sum of $500 paid in cash overpaid the note. The note now sued on was given without consideration, and in its entirety represents the illegal interest, and the court should so have instructed the jury.

According to the law as laid down in *Ward v. Sugg,* 113 N. C., 489, the note in question is not only void, and no recovery can be had thereon, but even if this note had been endorsed to an innocent holder in due course it would have been void. No agreement of the parties, whether recorded as a consent judgment or otherwise, could change this. *Ward v. Sugg, supra,* has been followed and approved in many cases cited in the Anno. Ed.

In *Covington v. Threadgill,* 88 N. C., 186, it was held that "A contract made in violation of penal statutes is illegal and will not be enforced by the courts, and where such contract furnishes the consideration of another promise the latter will also be deemed illegal, even though it may be partially supported by other and legal considerations." In this case there was no other consideration than the original illegal consideration, and the note is held not by an innocent party taking before maturity and for value, but is made between the original parties.

The illegality of usury cannot be waived by the agreement of the parties, not even by payment, and a consent judgment cannot be an estoppel when the agreement itself continues and renews the original illegal contract.

The former action having been merely a consent judgment dismissing the action, cannot be an estoppel on the defendant against whom it adjudged nothing, even if it could be held an estoppel on the plaintiff.

WALKER, J., concurs in dissent.

MARY M. WALDROOP v. LARRY S. WALDROOP ET AL.

(Filed 2 June, 1920.)

1. Superior Courts—Clerks of Court—Appeal—Estates—Contingent Interests—Statutes—Jurisdiction.

Where proceedings for the sale of lands affected with contingent interests have been commenced before the clerk and transferred to the Superior Court in term, it is of the same effect if the proceedings had been com-

menced in the Superior Court, when the statute relating to such sales has been complied with in all respects, and in proper instances, it has the jurisdiction to order the sale of the land for reinvestment.

2. Wills—Intent—Trusts.

The intent of the donor as gathered from the entire written instrument will control its interpretation as to the creation of a trust, without the use of peculiar or exact declarations, as "upon trust" or "trustee," etc., if such intent is otherwise sufficiently evident.

3. Same—Instructions—Education of Children.

After making two small bequests in money to be paid out of the "proceeds" of his estate, a testator devised and bequeathed all of the remainder of his property "real, personal and mixed" to his wife until the youngest child shall become of age, then to be equally divided between her and her children of his marriage, coupled with an instruction to give each of the children an equal education fitted to their station in life, with further provision for the payment of his debts and "whatever is left of my estate to be disposed of as aforesaid." The condition of the testator's estate, the expressions he used in his will, as to the "proceeds," "whatever is left of my estate," etc., and his evident knowledge of the character of his property, together with his direct instruction as to the education of his children, sufficiently evidenced his intent that it be held in trust subject to carrying out his instructions, and an order for the sale of his land for that purpose, under the necessity of the case, by the Superior Court, is affirmed, with the exception that a sufficient amount be withheld from the proceeds "for the education of the minor children."

APPEAL by defendants from *Ray, J.*, at the November Term, 1919, of MACON.

This is a proceeding commenced before the clerk and transferred to the Superior Court in term for the purpose of having certain lands devised in the will of W. H. Waldroop sold, and a part of the proceeds applied to the education of his children.

The widow of W. H. Waldroop is the petitioner, and all of his children are defendants, those under 21 years of age being represented by a guardian *ad litem*.

The will is as follows: "I, W. H. Waldroop, being of sound mind but feeble body, do make this my last will and testament:

"1. To my sons, Larry S. Waldroop and W. H. Waldroop, Jr., I give and bequeath the sum of one hundred and fifty dollars each to be paid them by my executor out of the proceeds of my estate.

"2. All the remainder of my property, real, personal, and mixed, I will and bequeath to my wife, Mary M. Waldroop, to have and to hold till my youngest child is of age, then to be divided equally between her and her children by me living at the time, and I instruct her hereby to give each of them an equal education fitted to their station in life.

"3. I desire my executor to see that all of my just debts are paid, and whatever is left of my estate to be disposed of as aforesaid.

"I hereby nominate and appoint my wife, Mary M. Waldroop, my executor without bond."

It is alleged in the petition that the petitioner has no sufficient money to maintain and educate the infant children, and this is admitted in the answer, but the defendants contend that the court has no authority to order a sale of the land, or to direct a part of the proceeds of sale to be set apart for the education of the children.

Judgment was entered ordering the land to be sold and that out of the proceeds a sufficient amount be withheld for the education of the minor children, and the defendants excepted and appealed.

Jones & Jones for petitioner.
A. W. Horn for guardian ad litem.

ALLEN, J. This proceeding is, in one respect, peculiar in that the plaintiff is seeking to have a trust impressed upon property which she owns in fee until the youngest child becomes 21 years of age, and thereafter at least a one-fourth interest therein in favor of the defendants, who resist the declaration and enforcement of the trust, but this results from the fact that the defendants are infants and own an interest in the land, and the careful and conscientious attorney, who represents them, felt it was his duty to submit the question to the court.

The proceeding began before the clerk, but when it was transferred to the Superior Court in term, it was as if commenced there (*Roseman v. Roseman,* 127 N. C., 494), and the court had jurisdiction to order a sale of the property for reinvestment, as all who could by any possibility have an interest in the land were parties. *Springs v. Scott,* 132 N. C., 548.

Can the court go further and direct that a part of the proceeds of sale be set apart for the education of the infant children of the testator?

The answer of this question requires an examination and construction of the clause instructing the executrix to provide for educating the children.

"It must be conceded that it is not necessary for the valid declaration of a trust that any peculiar language be used" (*St. James v. Bagley,* 138 N. C., 398). "The intent is what the court looks to." *Blackburn v. Blackburn,* 109 N. C., 488.

"No technical language, however, is necessary in the creation of a trust, either by deed or will. It is not necessary to use the words 'upon trust' or 'trustee,' if the creation of a trust is otherwise sufficiently evident. If it appears to be the intention of the parties from the whole instrument creating it that the property is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of

a trust, and impose corresponding duties upon the party receiving the title if it is capable of lawful enforcement." *Colton v. Colton,* 127 U. S., 310.

"It is sufficient if the language used shows the intention to create a trust, clearly points out the property, the disposition to be made of it, and the beneficiary. *Witherington v. Herring,* 140 N. C., 497." *Laws v. Christmas,* 178 N. C., 362.

It is true there must be certainty in the declaration of a trust, but provisions have been held to be enforcible "for the support of the child" (*Witherington v. Herring,* 140 N. C., 496), for "my maintenance" (*Bailey v. Bailey,* 172 N. C., 672), "used for the education of my children" (*Laws v. Christmas,* 178 N. C., 360), which are not more certain than the language used by the testator in the will now before us, and, "Giving a trust in discretion as to the method of carrying out a definite purpose does not render the trust void, and if the trustee refuses altogether to exercise the discretion with which he is invested the trust must not on that account be defeated. The real test is whether the language is imperative, or leaves the use and disposition of the property to the discretion of the donee." 26 R. C. L., 1184.

We have then the property affected "all the remainder of my property," and the beneficiaries, the children, clearly defined, and the purpose sufficiently certain, and the language of the testator, not merely expressive of his wish or desire, but imperative, "instruct" according to Webster and the contrary meaning, in addition to imparting knowledge or information, to command, to order, to direct, but notwithstanding these conditions, which would justify the declaration of a trust, we must look at the whole will of the testator, because, as said in Perry on Trusts, vol. 1 (6 ed.), sec. 114: "Every case must depend upon the construction of the particular will under consideration. The point really to be determined in all these cases is whether, looking at the whole context of the will, the testator intended to impose an obligation on his legatee to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to the legatee to act on them or not at his discretion."

In the first item he gives $150 each to two sons to be paid "out of the proceeds" of his estate. In the second he gives all the remainder of his property to his wife until the youngest child becomes 21, thus covering the period for their education, and instructs her to educate her children, and this charge or burden on the estate being satisfied, he then makes equal division between his wife and the children then living.

In the third item he provides for the payment of his debts and directs that "whatever is left of my estate to be disposed of as aforesaid."

The testator knew the condition of his estate, and that without a sale

of the land that his family could not be supported or his children educated, and therefore he speaks of "proceeds of my estate," "whatever is left," and after commanding that his children be educated in item 2, he directs in item 3 that what is left be "disposed of as aforesaid," showing that he still had in mind the gift to his wife with instructions to educate the children.

The change in the ownership of the property is significant. He gives all of it to his wife until the period for educating the children has passed, and then divides it equally between the mother and the children, indicating a purpose to put it in the power of the mother to provide for education, and then commanding her to do so. We cannot say the intent of the testator is clear, but when the language of the instruction is considered in connection with the whole will, and the circumstances surrounding the testator, we are of opinion the property is charged with the education of the children, but we do not approve of that part of the order directing that "out of the proceeds of said sale a sufficient amount be withheld for the education of the minor children."

Let this be stricken out, and, as thus modified, the order is affirmed.

The cause will be retained in the Superior Court with leave to apply from time to time upon notice for the allowance of such sums as may be required for education.

Modified and affirmed.

LUCY CULBRETH v. J. J. MARTIN, DOING BUSINESS UNDER THE FIRM NAME OF CHARLOTTE TRANSFER COMPANY, AND SOUTHERN RAILWAY COMPANY, AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS.

(Filed 2 June, 1920.)

Railroads— Baggage— Negligence—Commerce—Damages—Federal Statutes.

The limitation of recovery for the loss of baggage in interstate carriage of the passenger, by a regulation to that effect, duly filed and approved by the Interstate Commerce Commission is expressly reserved from the operation of the amendment to the Federal Statute, 9 August, 1916, ch. 301, 39 St. L., and where a verdict has been rendered in a sum in excess of one hundred dollars, it may be set aside and a judgment for the one hundred dollars entered, *non obstante veridicto*.

CIVIL ACTION, tried before *Ray, J.*, at November Term, 1919, of MACON, upon the following issues:

"1. Did the plaintiff deliver the trunk described in the complaint to the baggage agent of the defendant, Director General, at Charlotte, for the purpose of having same transported as baggage from Charlotte, N. C., to Cornelia, Georgia? Answer: 'Yes.'

"2. Did the defendant, Director General, negligently fail to transport and deliver said trunk? Answer: 'Yes.'

"3. What damage, if any, has plaintiff sustained by reason of the defendant's failure to transport and deliver said trunk? Answer: '$700.'"

The following is taken from the brief of the counsel for the plaintiff: "Upon the coming in of the verdict the plaintiff tendered judgment for $700 and costs. No tender of any kind has been made by the defendants up to that time. The defendant then tendered judgment for $100 and the costs, and this judgment was signed by the court *non obstanti veredicto,* he being of the opinion that as a matter of law that the defendant could not recover exceeding $100 on account of the stipulation in the baggage tariff. The plaintiff excepted to the judgment as signed."

The plaintiff appealed to the Supreme Court.

It appears in the record that the judgment signed by the judge was for $700, but that this was a mistake, and that the judgment should have been signed for $100 is admitted in this Court by counsel for plaintiff in their brief.

T. J. Johnston and Jones & Jones for plaintiff.

J. Frank Ray and Martin, Rollins & Wright for defendant.

BROWN, J. It is admitted that there is a limitation of liability to $100, but the plaintiff contends that under the act of Congress of 4 March, 1915, known as the Cummings Amendment, the plaintiff is entitled to recover the full amount of damages of $700. It appears that this statute was amended on 9 August, 1916, ch. 301, 39 Statute L, 441, as follows: "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation, or agreement, or a lease as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats or trains, or boats carrying passengers," etc., and in said amendment it is provided that the carrier might limit its liability by filing schedules with the Interstate Commerce Commission, as was done in this case.

We agree with the judge below that the act of Congress of 4 March, 1915, as amended, expressly exempts baggage from its provisions, requiring the payment of full actual damage in case of loss of baggage. The limitation of liability of one hundred dollars contained in the tariff filed with Interstate Commerce Commission and duly approved by the Director General, in effect at the time of the loss of the baggage, governs this case and restricts the plaintiff's recovery to $100.

The judgment of the Superior Court for $100 is

Affirmed.

O. M. POWERS v. PAUL MASHBURN.

(Filed 24 March, 1920.)

CIVIL ACTION, tried before *Allen, J.*, at November Term, 1919, of COLUMBUS, upon these issues:

"1. Did the defendant wrongfully and unlawfully assault the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. What amount of actual damages is the plaintiff entitled to recover of the defendant? Answer: '$600.'"

Defendant appealed.

No counsel for plaintiff.
Irvin B. Tucker for defendant.

PER CURIAM. We have carefully examined the assignments of error in this case, and do not think it necessary to discuss them.

We find nothing in them to necessitate another trial.

No error.

HORACE R. DOWELL v. RALEIGH SAVINGS BANK AND TRUST COMPANY.

(Filed 7 April, 1920.)

APPEAL by plaintiff from *Guion, J.*, at the October-November Term, 1919, of WAKE.

Manning, Kitchin & Mebane and Armistead Jones & Son for plaintiff.
R. N. Simms for defendant.

PER CURIAM. We have carefully examined this case, and can see no error in it which is sufficient ground for a reversal of the judgment. The ruling of the judge upon the evidence appears to be correct, and when the other exceptions are considered, we agree with the court that there was not any evidence which could be held as sufficient in law to support a verdict for the plaintiff; and the judgment of nonsuit was properly allowed. This would still be our conclusion if the rejected evidence had been admitted.

No error.

GEORGE L. FORESTER v. ANSON G. BETTS, TRADING AS ANSON G. BETTS AND COMPANY.

(Filed 19 May, 1920.)

Attorney and Client—Principal and Agent—Contracts—Quantum Valebat.

In the absence of agreement upon a certain sum, an attorney may recover the reasonable value for the services he has rendered his client; and where there is evidence that it is in a certain amount, the trial judge may not properly instruct the jury that it is excessive, or be required to set aside the verdict therein as a matter of law.

CIVIL ACTION, tried before *Finley, J.*, and a jury, at December Term, 1919, of BUNCOMBE.

The action is to recover the value of services rendered by plaintiff as agent and attorney of defendant in collecting from several railroad companies for overcharges of freight on shipments of lumber to the amount of $570, plaintiff claiming and testifying that his services were reasonably worth $285, being 50 per cent on the amount collected.

There was denial of liability on part of defendant, and verdict for plaintiff for amount as claimed. Judgment, and defendant excepted and appealed, assigning for error that the court should have ruled that the amount claimed was an excessive charge, and as a matter of law could not be enforced, and that the judge should have so instructed the jury.

F. W. Thomas for plaintiff.
Stevens & Anderson for defendant.

PER CURIAM. Plaintiff, the only witness examined, testifying in his own behalf, stated in effect that he was an expert in tariff and freight charges by railroads, having had an experience of 25 years in this kind of work. That as an employee of defendant he undertook the collection of various claims by his agent from several railroad companies for overcharges of freight, and collected for him, by reason of various shipments, the amount of $575.79. That he was engaged in the work for from 12 to 18 months. That as the result of defendant's work, some of the claims were paid directly to defendant, but in several instances he had to appear before the Interstate Commerce Commission in order to enforce collection. He testified further, without objection, so far as the record discloses, that his services on these claims were worth the amount claimed. Witness also stated that there were additional claims collected amounting to $1,500 which were not sued for in this action.

The value of services of the kind presented are so dependent on the varying facts of different cases that no definite rule can well be referred

to as controlling. Speaking generally, an agent or attorney in the absence of a special contract is entitled to recover the amount that is reasonable and customary for work of like kind, performed under like conditions and circumstances, and under such a ruling the question of amount is left almost entirely to the decision of the jury.

Speaking to the subject in Weeks on Attorneys, p. 576, the author says: "In the absence of a contract between attorney and client fixing the value of the services of the former at the price to be paid therefor, the attorney has the right to reasonable compensation; but the jury are the proper judges of the value of such services, and in considering the reasonableness of such compensation they may take into consideration all the circumstances of the case, and are not bound by the opinion of witnesses summoned as experts, but such opinion should be considered in connection with the other evidence in the case. And the jury having given their verdict, the appellate court will not interfere with it unless the judge in the court below has misled the jury by some misdirection."

On the record the question is solely as to the value of the services rendered, and under the principles stated, the jury having determined upon the amount, there is nothing in the record that will justify the Court in disturbing the conclusion they have reached.

There is no error, and the judgment on the verdict is affirmed.

No error.

D. J. THIES v. S. B. TANNER, JR., AND J. S. DURHAM.

(Filed 12 May, 1920.)

(For digest, see *Wittson v. Dowling, ante*, 542.)

CONTROVERSY without action, heard before *Lane, J.*, at March Term, 1920, of MECKLENBURG.

Tillett & Guthrie and C. H. Gover for plaintiff.
Cansler & Cansler for defendant.

PER CURIAM. The pertinent and controlling facts in this case are substantially the same as those of *Wittson v. Dowling, ante*, 542, and for the reasons stated in that opinion, the judgment for plaintiff enforcing the contract of purchase is

Affirmed.

D. E. PIGFORD AND WIFE v. GOLDSBORO LUMBER COMPANY.

(Filed 10 March, 1920.)

Evidence—Circumstantial Evidence—Nonsuit—Trials.

Circumstantial evidence that the defendant negligently set out fire and destroyed the plaintiff's property is sufficient to overrule a judgment as of nonsuit thereon, if of sufficient probative force.

CIVIL ACTION, tried before *Daniels, J.*, at December Term, 1919, of ONSLOW, upon these issues:

"1. Was the property of plaintiffs injured by fire on account of the negligence of the defendant as alleged? Answer: 'Yes.'

"2. If so, what damages have plaintiffs sustained? Answer: '$1,000.'"

Defendant appealed.

Cowper, Whitaker & Allen; Frank Thompson; L. R. Varser, and Duffy & Day for plaintiffs.

Thomas D. Warren and Ward & Ward for defendant.

PER CURIAM. The defendant moved to nonsuit in apt time upon the ground that the evidence was not sufficient to go to the jury tending to prove that plaintiffs' property was burned as a result of defendant's negligence. That is the only assignment of error. It is unnecessary to set out the evidence. It is largely circumstantial, but it is in our opinion amply sufficient in probation for us to warrant the judge in submitting the issues to the jury. Circumstantial evidence, as stated in *Ashford v. Pittman,* 160 N. C., 47, has often been allowed to determine more serious issues than those submitted in this case.

No error.

W. B. DRAKE, JR., RECEIVER OF THE RALEIGH MILLING COMPANY, v. B. J. SPENCER.

(Filed 17 March, 1920.)

Evidence—Instructions—Controverted Facts.

In this action to recover damages for breach of contract of sale of a lot of corn, each party alleging breach thereof by the other, there was no exception of record to evidence and *Held*, the controversy was one of fact and there was no error in the charge excepted to.

CIVIL ACTION, tried before *Guion, J.*, at November Term, 1919, of WAKE, upon these issues:

"1. Did the Raleigh Grain and Milling Company make a contract with the defendant for a lot of corn, as alleged? Answer: 'Yes.'

"2. Was the Raleigh Grain and Milling Company ready, able, and willing to perform the contract on its part? Answer: 'Yes.'

"3. Did the defendant Spencer refuse to perform his part of the contract? Answer: 'Yes.'

"4. What damage, if any, is the plaintiff entitled to recover of the defendant Spencer? Answer: 'The difference between $1.184 and $1.64 per bushel, equal $775.20.'"

From the judgment rendered the defendant appealed.

Willis Smith and J. Crawford Biggs for plaintiff.
Ward & Grimes for defendant.

PER CURIAM. This action was brought by the plaintiff as receiver of the Raleigh Grain and Milling Company to recover damages on account of failure of the defendant to perform a contract to sell to the Raleigh Grain and Milling Company 1,700 bushels of corn, for which the milling company agreed to pay $1.184 per bushel f. o. b. Wysocking, N. C., and was to furnish the bags in which the corn was to be shipped.

No exceptions to the evidence are presented in the record, and only one exception to the charge. Upon a careful examination of the evidence and the charge, we are unable to find any error committed by the court in presenting the case to the jury. The questions involved are matters of fact, and appear to have been clearly and fairly presented to the jury.

No error.

ELIZA WHITE RICHTER v. MRS. ELIZA F. WHITE, MRS. MINNIE WILLIAMS COX AND C. L. COX.

(Filed 24 March, 1920.)

Trusts—Parol Trusts—Deeds and Conveyances.

Evidence that at the time of his deed to lands to his wife the grantor said a certain portion was to go to one of his grandchildren, and a certain other portion to another of them, to which the wife replied that the children would be taken care of, corroborated by the testimony of another witness that immediately after the deed was signed the wife came out of the room and said that her husband had given her everything to do as she pleased with for life and after her death it was to be divided between the two grandchildren, is sufficient to be submitted to the jury to engraft a parol trust in remainder in favor of the grandchildren, upon the deed to the wife.

APPEAL by defendants from *Daniels, J.*, at the September Term, 1919, of SAMPSON.

This is an action to engraft a parol trust upon land conveyed by Oliver P. White to his wife, the defendant, the plaintiff alleging that at the time of the execution of the conveyance it was understood and agreed between the parties that the defendant would hold the title to the property for herself for life, and then for the plaintiff, Eliza White Richter, their grandchild, and the defendant, Minnie Williams, another grandchild, in equal shares.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Grady & Graham, Henry E. Faison, Fowler & Crumpler, and Barker & Robinson for plaintiff.

Butler & Herring, Faircloth & Fisher, and Oates & Herring for defendants.

PER CURIAM. The arguments of counsel for plaintiff and the defendant have been earnest and able, and the briefs filed full and satisfactory, both in the statements of fact and the discussion of the law, but at last the real question in controversy is whether there is evidence fit for the consideration of the jury to establish the parol trust alleged in the complaint, and, after a careful consideration of the record, and of the authorities, we are of opinion the case could not have been withdrawn from the jury.

The evidence of the witness Hall, the justice of the peace, who took the probate of the deed to the effect that at the time the deed was signed the grantor, O. P. White, spoke to his wife, and pointing to the land said this part down this way is to go to one, naming her, and this piece to go to the other, naming her, and that his wife, the grantee, replied that the children would be taken care of all right, permitted the inference that the deeds were executed pursuant to a previous agreement and understanding, and this is strongly corroborated by the evidence of Paul White, who was living with Mr. and Mrs. White, who testified that immediately after the deeds were signed Mrs. White came out of the room and told him that Mr. White gave her everything to do as she pleased with in her lifetime, and that after her death it was to be divided between the two grandchildren.

There is much other evidence sustaining the contentions of the plaintiff all of which was submitted to the jury under full, fair, and accurate instructions.

In our opinion, the evidence meets the requirements of the law, and it is not necessary to enter into a discussion of the authorities.

No error.

BENNIE ROE, BY HIS NEXT FRIEND v. JAMES JOURNEGAN.

(Filed 24 March, 1920.)

Evidence—Declarations Against Interest—Title—Burden of Proof.

The declarations of the son of one in the chain of title to lands, is not against interest when he had acquired other lands and had moved thereon to live, and was not the only heir at law of his father.

APPEAL by plaintiff from *Guion, J.*, at the November Term, 1919, of FRANKLIN.

This is an action to recover land.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

Wm. H. and Thos. W. Ruffin and W. M. Person for plaintiff.
W. H. Yarborough for defendant.

PER CURIAM. The facts are fully stated in the report of the first appeal in this action. 175 N. C., 262.

On the second trial the court admitted the same declaration of W. S. Roe, which the court formerly held to be incompetent, and the plaintiff, having excepted, again appealed.

This ruling of the judge was upon the idea that the defendant having introduced evidence that W. S. Roe was not the sole heir of his father and that he moved from the land in controversy and bought other land; that this met the requirements of the court in the former opinion, but, while these circumstances were properly considered they do not meet the burden cast by law on the defendant of showing "That the declaration was against the interest of the declarant, that 'he had no probable motive to falsify the fact declared' (*Smith v. Moore*, 142 N. C., 231), and that there was 'a total absence of interest to pervert the fact.' *Smith v. Moore*, quoting from Lord Ellenborough." 175 N. C., 262.

New trial.

J. H. ELLINGTON v. R. H. RICKS.

(Filed 24 March, 1920.)

1. Negligence—Invites—Premises—Owner—Reasonably Safe Condition.

One who invites another on his premises owes him the duty of keeping such of them as is covered by the invitation, including that close thereto, and upon which the invitee may be expected to casually go, in a reasonably safe condition, so that he may not be subject to injury.

2. Same—Explosives—Evidence—Questions for Jury—Nonsuit—Trials.

The owner of the premises had contracted for the replacement of his old gasoline generator with a new one, which the seller was to install in a small brick house, where the old one had been used. There was evidence tending to show that the superintendent of the owner assumed to drain the old generator of gasoline and to move it from the brick house, and after he had placed it a short distance therefrom the owner called attention of the employee of the seller, doing the installation, to the old generator, and while he was examining it some gasoline left therein exploded to the injury of the seller's employee, for which he brings his action against the owner to recover damages. *Held*, it was for the determination of the jury as to whether the owner observed the care required of him to keep his premises in a reasonably safe condition, and a motion for judgment as of nonsuit was properly overruled.

APPEAL by defendant from *Guion, J.*, at the October Term, 1919, of WAKE.

This is an action to recover damages for personal injury inflicted while the plaintiff was engaged in the installation of an acetylene gas generator on the premises of the defendant.

The defendant lived about five miles from Rocky Mount in Nash County. He had in use an acetylene gas generator, which furnished light for his home. It had been used about thirteen years and was located in a small brick house about 25 feet from the residence; the brick house was not used for any other purpose; it had one door but no windows; the gas generator was placed in front of the door, a few feet inside the house, J. B. Colt & Co., sold to defendant a new generator and was to have it installed, the defendant agreeing to pay the cost at a stipulated price per hour. There was in the State several men who made it a business of installing these generators, one of whom was the plaintiff, and the State Manager sent the installing contract of the machine sold Mr. Ricks to the plaintiff. The plaintiff and his helper, Mr. Maynard, proceeded, after the generator had been received at Mr. Ricks', to the defendant's to install the generator. They reached there about 11 o'clock of the day. Mr. Bozeman, the farm superintendent and general manager of Mr. Ricks, met them, and they went to the gas house. The new generator had to be uncrated; the old machine to be disconnected and removed from the gas house.

The plaintiff testified in his own behalf as follows:

"An acetylene gas generator furnishes gas for lights for homes, stores or for cooking or ironing. The gas is made by water coming in contact with carbide in the machine and is conducted from the machine by pressure of one and a half pounds to the square inch. The gas drops in the carbide and that comes under a bell, and as it goes out it lowers and feeds more carbide. It works automatically by a bell."

That he was doing work for Mr. Williams at Red Oak and this paper came to him. He went to Mr. Ricks' place, five miles from Rocky Mount. One of Mr. Ricks' hands met him at Dortch's store and carried him over in a buggy to Mr. Ricks' home. When he got there Mr. Bozeman was not at home, but his wife sent for him and he came up and said that they were ready for the installation to be made, and they went in and looked at the old machine that was then in use; that he told Mr. Bozeman that that make of machine was new to him; that he did not know anything about it, and did not know where the carbide was in the chambers and asked Mr. Bozeman to remove the carbide from the old machine and he said he would do it; that witness went and uncrated the new machine, which was fifty yards from the outhouse where the old machine was and when he got through that work of uncrating, Mr. Bozeman said he had the carbide removed from the old machine and witness asked Mr. Maynard, his helper, to disconnect the machine for him.

The old machine was in a little brick house almost opposite from where the witness was working. The brick house was used only for these gas generator machines. It was about 20 or 25 feet from the main residence. He went to work about 12 o'clock and it took him 15 or 20 minutes to uncrate his machine. Mr. Bozeman said he had the carbide removed and they had to tilt the machine to get it out of the house. Mr. Bozeman had some colored men to help him get it out and directed the work of removing the old machine. The only thing witness did was to put his hands on the old machine when it was tilted over to be moved out of the house. The machine was 7 or 7½ feet tall. Mr. Bozeman had the direction and control in the removal of the old machine. It took 15 or 20 minutes to remove the old machine out of the house after witness got back from uncrating his machine and they set it 12 or 15 feet from the door. Witness and his helper had to build a brick foundation right up there in the same house to put the new machine on; but after they got the foundation built they set up their machine and while it was being filled with water Mr. Maynard called him and said who is this machine made by and the witness said he saw some inscription on the side and that he walked up to the side of the old machine next to Mr. Maynard and saw the nameplate on it and he said it was made by some Chattanooga firm, and he said he saw some printing matter on one side, and he walked around to the opposite side of the machine, and Maynard walked toward the door and just as he got near the door and when witness got on the other side and saw the printed (matter) and stooped over to get his face up even with it, the old machine exploded and threw him 12 or 15 feet from the machine. It was sitting a little to the left of the house from which it was taken, and

from 12 to 15 feet from the door. It was something like two and one-half feet in diameter, and from the base to the top was something like seven feet, I believe, and was made out of galvanized iron. Mr. Bozeman gave him no warning about the old machine. He did not know there was any danger from the old machine as he stood by it. The machine was in a dilapidated condition, and after Bozeman told witness that he had removed the carbide that he, witness, could not understand there would be any danger from what he understood about the carbide system, and that he knew that some of the water had been poured out and practically all of it. But on the way to Rocky Mount after the explosion, Mr. Bozeman told me and Maynard that he had not removed all the carbide.

"It required 10 or 15 minutes for the water to run into the new tank installed by him. During that time he had nothing else to do and Mr. Maynard called him and asked by whom the old tank was made and he walked out to where Maynard was; that he had charge of the contract and Mr. Maynard was his helper; that he brushed off the name plate with his cap; that if the man who removed the carbide from the tank had taken all that there was in the main receptacle, there was no place where the carbide could have stuck in the wall to have caused the explosion if it had been shaken up. The cause of the explosion was because the carbide was in the water."

At the conclusion of the evidence there was a motion for judment of nonsuit, which was denied, and the defendant excepted.

There was a verdict and judment for the plaintiff and the defendant appealed.

R. N. Simms for plaintiff.
Battle & Winslow and Manning, Kitchin & Mebane for defendant.

PER CURIAM. There are several exceptions in the record, but all of them are covered by the exception to the refusal to nonsuit, and on this it is conceded, and properly so, that the plaintiff was an invitee on the premises of the defendant, and as such entitled to hold the defendant to the duty of keeping the premises covered by the invitation in a reasonably safe condition in order that he might not be subjected to injury.

It is also not contended by the defendant that there is no evidence that the part of the premises, where the plaintiff was when he was injured, was unsafe, but the position insisted upon in the able and learned brief of the defendant and on oral argument is that the plaintiff when injured was on a part of the premises where he was not expected to go.

In other words, we are asked to hold as a matter of law that the plaintiff by stepping outside of the little room in which the new tank was being installed, which was 6 by 12 or 14 feet, while waiting for the tank to fill with water and walking 12 or 15 feet to look at the old tank, from which Bozeman, the superintendent and manager of the defendant, had told him the carbide, the cause of the explosion, had been removed, departed from the terms of his invitation and must be treated as a trespasser or licensee at the time of his injury, and as such the defendant owed him no duty except to refrain from wilful injury.

"The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils." 20 R. C. L., 55, and that "The owner or occupant of premises is liable for injuries sustained by persons who have entered lawfully thereon only when the injury results from the use and occupation of that part of the premises which has been designed, adapted, and prepared for the accommodation of such persons." 20 R. C. L., 67.

If an invitee goes "to out-of-way places on the premises, wholly disconnected from and in no way pertaining to the business in hand" and is injured, there is no liability. *Glaser v. Rothschild,* 221 Mo., 180, but a slight departure by him "in the ordinary aberrations or casualties of travel" do not change the rule or ground of liability, and the protection of the law is extended to him "while lawfully upon that portion of the premises reasonably embraced within the object of his visit." *Monroe v. R. R.*, 151 N. C., 376; *Pauckner v. Waken*, 14 L. R. A. (N. S.), 1122.

As said by *Winslow, C. J.*, in *Charron v. Fuel Company*, 149 Wis., 240 speaking of a similar question as applied to an employee. "The law aims to be reasonable. It recognizes that it has to deal with imperfect human beings and not with faultless and unerring automatons, and that its rules should be shaped accordingly. It must recognize the fact that men employed in hard physical labor require and habitually take some brief respite at times during the work as opportunity offers; and it must also recognize the fact that such a respite, if only of the ordinary and usual nature, cannot rightly be called a leaving of the employment. In the present case the plaintiff had just carried a plank, doubtless of considerable weight, to the top of the structure. In returning he stopped for a minute or two at a convenient stopping place stepped perhaps eight feet from his line of travel, and gazed at the operations upon and about the vessel and the harbor below, which were doubtless interesting and attractive. We do not feel that we are obliged to hold or ought to hold as matter of law that this brief and very natural break in the plaintiff's routine labor divested him of his character as an employee."

The tank which caused the injury was close to the course of travel from the little house where the new tank was being installed to the dwelling; it was within 12 or 15 feet of the little house and it was on that part of the premises being used in the installation of the new tank, because it was necessary to place it there in the proper performance of the duty, and this was done under the direction of the manager and superintendent of the defendant.

The plaintiff and Bozeman were in fact using in their work the part of the premises where the plaintiff was standing at the time of his injury.

We do not think under these conditions it can be said as a legal conclusion that there was such a departure by the plaintiff from the scope of his invitation as to bar a recovery.

No error.

J. P. QUELCH ET AL. v. D. K. FUTCH ET AL.

(Filed 24 March, 1920.)

Judgments, Final—Husband and Wife—Action Against Wife—Independent Action—Equities of Wife.

Where the husband is sued in ejectment to final judgment, and thereafter summons is issued as a continuance of the same cause to recover a judgment against the wife, the action against her is properly dismissed, it being allowed the plaintiff to bring an independent action against her, and for her to prosecute her suit against her husband for the enforcement of equities she may claim from him in the lands.

APPEAL by defendant from *Allen, J.*, at the October Term, 1919, of NEW HANOVER.

Motion in the cause heard October Term, 1919, Superior Court New Hanover County, Allen, J. This action was brought against D. K. Futch and not against Hannah T. Futch. The cause came to this Court and the final decree entered 174 N. C., 395; 175 N. C., 694. After the final judgment was entered the plaintiff issued the summons against Hannah T. Futch, wife of D. K. Futch, seeking to continue the action of ejectment and to recover a judgment against her. The defendant respondent, Hannah T. Futch, moved to dismiss the action as to herself because she had been brought in after the final decree had been entered, and that the plaintiff's remedy was by bringing a separate action against her, whereupon the court made the following order:

"This cause coming on to be heard before his Honor, Oliver H. Allen, Judge presiding, at the October Term, A.D., 1919, of the Superior Court

of New Hanover County, and at the conclusion of the reading of the pleadings in this cause the plaintiffs made a motion to dismiss the action as to D. K. Futch upon the ground that the action was at an end as to him for the reason that a final judgment had heretofore in this cause been entered as to him, from which judgment he appealed to the Supreme Court, and upon the appeal the Supreme Court affirmed the judgment of the lower court, and that upon the coming down of the opinion from the Supreme Court the judgment was entered against D. K. Futch according to the certificate from the Supreme Court, as appears of record in this cause, and for judgment striking out the defendant Hannah T. Futch's answer, and for judgment against her for the failure to file a defense bond as required by the statute, and for judgment against Hannah T. Futch on the pleadings because as a matter of law Hannah T. Futch was bound by the judgment against her husband, D. K. Futch, heretofore entered in this cause, and the defendant Hannah T. Futch having made a motion to dismiss this action as against her because the plaintiff had filed no prosecution bond as required by law, and that upon her answer on the record it appeared that she had been made a party defendant to this action after the action had finally terminated, it having originally been brought against her husband, and upon the further ground that from the defendant's answer it appeared that she had equities and raised issues between herself and her husband, and that Hannah T. Futch was wrongfully made a party defendant to this action;

"And the court being of opinion, at the conclusion of all the argument and readings of the record in this cause, that Hannah T. Futch was improvidently made a party to this action, and that the action should be dismissed as to her, and that it would be more conducive to an orderly trial of all the matters in dispute between the parties if this action is dismissed as to Hannah T. Futch without prejudice to the rights of any of the parties hereto to bring and prosecute a new action if the plaintiffs so desire:

"It is, therefore, ordered, adjudged, and decreed by the court that this action be and the same is hereby dismissed as to Hannah T Futch, without prejudice to the rights of the plaintiffs to bring a new action against the said Hannah T. Futch and her husband, D. K. Futch, if they so desire, or against either one or the other of them; and that the defendant Hannah T. Futch and D. K. Futch recover of the plaintiffs the costs of this action incurred since the said Hannah T. Futch was made a party thereto.

"It is further ordered and adjudged by the court that the said Hannah T. Futch may, if she so desires, bring and prosecute her action against her said husband without being prejudiced by this order, and

this judgment is to be entered as a final judgment in this case, and the case is ordered stricken from the docket of this court. Defendant's motion was made first and allowed; plaintiff's motions were not passed on. Plaintiff allowed to file prosecution bond.

O. H. ALLEN,
Judge Presiding.

From the foregoing judgment, the plaintiff having excepted, appealed to the Supreme Court.

Wright & Stevens and McClammy & Burgwin for plaintiffs.
E. K. Bryan for defendant Hannah T. Futch.

PER CURIAM. The order of his Honor, Judge Allen, is itself a full statement of the point at issue.

We think the order made by his Honor is entirely correct and the same is

Affirmed.

W. A. CARROTHERS v. JAMES STEWART AND COMPANY.

(Filed 31 March, 1920.)

Contracts, Written—Parol Evidence—Merger—Distinct Contracts—Master and Servant—Employer and Employee.

Where there is evidence that a contractor for the United States Government who was to furnish carpenters, etc., to the Government for its works, induced the plaintiff, through its agent, to sign a written contract with the Government for seventy cents an hour, upon a previous verbal agreement that he should receive eighty-seven and one-half cents per hour, of which the contractor was aware, in the employee's action against the contractor to recover this difference; *Held*, there was evidence to sustain plaintiff's contention, and that the previous parol contract between the plaintiff and defendant was neither contradictory to that signed by the plaintiff with the Government, nor did it merge therein, the two being separate and distinct.

CIVIL ACTION, tried before *Calvert, J.*, at October Term, 1919, of CUMBERLAND, upon this issue:

"What amount, if any, is plaintiff entitled to recover of defendant? Answer: '$553.46, and interest.'"

The defendant appealed.

Sinclair & Dye for plaintiff.
Rose & Rose and Nimocks & Nimocks for defendant.

PER CURIAM. The plaintiff was an employee of defendant as a carpenter foreman receiving 87½ cents an hour. The defendant be-

came a contractor of the U. S. Government to do construction work in France. The Government was to furnish all tools, equipment, etc. The necessary labor and superintendent was to be secured by the defendant. The defendant, through its superintendent, E. N. Pratt, induced plaintiff to go to France. He signed the contract to work for the Government at 70 cents per hour. This contract is also signed by defendant as agent of and on behalf of the Government. Plaintiff alleges that while in employment of defendant, and before signing the contract to work for the Government at 70 cents, he had an agreement with Pratt for defendant that if he would go to France and sign the contract with the Government, he should receive at least 87½ cents an hour. Plaintiff sues to recover the difference between 70 cents per hour and 87½ cents per hour, admitted to be $553.46.

At conclusion of evidence the defendant moved to nonsuit the plaintiff.

We think there is abundant evidence to establish the agreement to pay 87½ cents an hour.

The plaintiff testifies to it, and also that in his formal application for employment he inserted in it a condition that he was to receive 87½ cents an hour, and gave it to Pratt for defendant.

There is evidence that defendant knew of Pratt's contract, and never repudiated it. This is shown by Pratt's letter to defendant of 22 June, 1918, in which Pratt informs them of his agreement with plaintiff. This letter is a strong testimonial to the efficiency of the plaintiff. We think there is abundant evidence of the agreement to pay the 87½ cents to plaintiff if he would sign up with the Government at instance of defendant, and go to France, and that defendant knew of the agreement and ratified it.

It is contended that the agreement to pay 87½ cents is a violation of the rule which prohibits the contradiction of a written contract by parol evidence. We do not think the rule applies here.

The contract in writing was made with the Government, and in it plaintiff agreed to accept 70 cents per hour from the Government. The contract for the 87½ cents per hour was in parol, and a separate and distinct contract entered into by plaintiff with defendant before the contract with the Government was signed.

The consideration for the parol, the first contract, was that if plaintiff would enlist with defendant for the Government as a workman the defendant would see to it he received at least 87½ cents per hour. This was a separate and distinct contract, and preceded the one in writing with the Government. It constituted a condition precedent to the plaintiff's entering into and executing the written contract with the Government, and is separate and distinct from it. Under the authorities there is no contradiction, and parol evidence was competent to prove such condition precedent. Elliott on Contracts, secs. 1629-1650;

Typewriter v. Hardware Co., 143 N. C., 97; Taylor Evidence, sec. 1038; *Basnight v. Jobbing Co.*, 148 N. C., 357.

Nor do we think the parol contract to pay 87½ cents is merged into the written contract to pay only 70 cents for the very good reason that the latter was made with the Government. The parol contract was made with the defendant and guaranteed to plaintiff wages while in France of not less than 87½ cents per hour.

We think the rulings of the court upon the questions of evidence were correct, and that the charge presented the matter to the jury fairly and fully.

We find

No error.

JANE COWAN v. GEORGINA COWAN

(Filed 31 March, 1920.)

Pleadings—Fraud—Allegations—Evidence.

In an action to set aside a deed for fraud alleged to have been committed by defendant, evidence that another had committed the fraud while acting for the defendant is competent, when it appears that the defendant was not taken by surprise.

APPEAL by defendant from *Calvert, J.*, at the October Term, 1919, of BLADEN.

This is an action to set aside certain deeds executed by the plaintiff to the defendant, her daughter-in-law, on the ground of fraud.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

J. Bayard Clark for plaintiff.

Lyon & Lyon for defendant.

PER CURIAM. We have carefully examined the record, and find no error.

The evidence as to the conduct of Mathis which was objected to upon the ground that the complaint alleged that the defendant, and not Mathis, had committed the fraud, was competent, as Mathis was acting for the defendant, and that the defendant was not taken by surprise is shown by the fact that he was introduced as a witness for the defendant.

There was ample evidence to support the allegations of the complaint, and the motion for judgment of nonsuit was properly denied.

No error.

IN RE WILL OF E. J. FINCH.

(Filed 14 April, 1920.)

Appeal and Error—Remarks of Court—Wills—Undue Influence—Mental Capacity—Harmless Error.

Where upon the trial of a caveat to a will the issues of mental capacity of the testator and undue influence have been submitted to the jury, and of the latter, there has been neither evidence or controversy, and the jury held there was not undue influence, the remarks of the trial judge of the high character of the counsel who drew the will, though they may have been prejudicial to the caveators on the issue of undue influence, are immaterial and not reversible error.

ISSUE of *devisavit vel non* as to the due execution of the will of E. J. Finch, deceased, tried before *Bryson, J.*, and a jury, at November Term, 1919, of DAVIDSON.

The jury rendered the following verdict:

"1. Was the paper-writing propounded dated 23 April, 1918, executed by the testatrix, E. J. Finch, according to the formalities of law required to make a valid last will and testament? Answer: 'Yes.'

"2. At the time of the signing and execution of said paper-writing did the said E. J. Finch have sufficient mental capacity to make and execute a valid last will and testament? Answer: 'Yes.'

"3. Was the execution of the said paper-writing propounded in this case procured by undue influence, as alleged? Answer: 'No.'

"4. Is the paper-writing bearing date 23 April, 1918, propounded 2 July, 1918, and each and every part thereof the last will and testament of E. J. Finch? Answer: 'Yes.'"

Judgment on the verdict for the propounders, and the caveator excepted and appealed.

A. E. Holton, Walser & Walser, and J. R. McCrary for appellants.

Brooks, Sapp & Kelly, Phillips & Bower, and Roper & Roper for propounders, appellees.

PER CURIAM. Under a full and comprehensive charge the jury have rendered their verdict in favor of the propounders, finding on separate issues that the testatrix had the requisite mental capacity, and that there had been no undue influence exerted, and on careful examination we are of opinion that the exceptions of appellant present no substantial objection to the validity of the trial and judgment.

The remarks of his Honor in approval of the high character of counsel who drew the will, however just in themselves, might have become the source of prejudicial error on a debateable question, but in the way

they are presented in the record these comments could only have had significance on the issue as to undue influence, and there are no facts in evidence which show or tend to show the exertion or effect of such influence by the propounders or any other.

This exception, therefore, is immaterial, and must be disallowed.

A perusal of the record will show that the verdict of the jury is fully justified on all the issues. That no reversible error has been made to appear, and the judgment upholding the will should be affirmed.

No error.

P. W. GARLAND, TRUSTEE v. L. C. ARROWOOD ET AL.

(Filed 5 May, 1920.)

Bankruptcy—Betterments—Measure of Damages—Statutes.

The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another with his consent, in fraud of the rights of his creditors, may recover as for betterments, the value of the improvements to the land, but not a greater amount so expended, Rev. sec. 655, which will be a lien upon the lands; and a judgment that if it be not paid at a certain date the land be sold for cash, after due advertisement, by a commissioner appointed by the court, is correctly entered.

APPEAL by plaintiff and defendants from *Shaw, J.,* at December Term, 1919, of GASTON.

This is an action by the trustee in bankruptcy of Luther C. Arrowood to subject certain lands to a charge for money alleged to have been wrongfully invested by the bankrupt in building a barn and dwelling-house, and in making other improvements thereon, with the consent of the owner, William C. Arrowood, in fraud of the creditors of the bankrupt.

This case was before the Court at Fall Term, 1916, 172 N. C., 591, upon the statute of limitations; at Fall Term, 1917, 174 N. C., 657, upon the competency of evidence; and again at Spring Term, 1919, upon the action of the lower court in setting aside the verdict on the second issue on which the jury found that Luther C. Arrowood was insolvent at the time of making said improvements. A new trial was awarded by this Court in each of said appeals for errors in the rulings of the lower court upon the questions above stated.

Upon the last appeal the new trial was restricted to the second issue only. On the last trial, which is now brought up for review by this appeal, the issue submitted was, "Did the defendant, Luther C. Arro-

wood, at the time he invested his individual funds in improvements on the land of William Arrowood, known as the 'home place,' retain property fully sufficient and available for the satisfaction of his then creditors?" The jury responded that he did not. Upon this issue, and upon the issues found in the previous trial, 177 N. C., 371, his Honor entered judgment that the defendant had invested his own money in improvements on the land of his father, described in the complaint, to the amount of $1,400, and that the said investment had enhanced the value of the said land in the sum of $1,100, and rendered judgment in favor of the plaintiff in that sum from the first day of the term, said recovery to be administered by the trustee in bankruptcy in accordance with the rights of the parties entitled to share in said fund, the said amount to be a charge upon said real estate, and if not paid by February, 1920, the land should be sold for cash, after due advertisement, by the commissioner appointed by the court for that purpose. From this judgment both parties appealed.

Mangum & Woltz and S. J. Durham for plaintiff.

Osborne, Cocke & Robinson, Carpenter & Carpenter, and Arthur C. Jones for defendants.

PER CURIAM. The plaintiff appeals from the refusal of the court to enter judgment for $1,400, the sum which the jury found the bankrupt had invested in the improvement of his father's land. In *Michael v. Moore,* 157 N. C., 462, where the husband had invested funds in the improvements of his wife's land, the Court did not expressly pass upon the point, but by analogy to the charge allowed for betterments, Rev., 655, we think that the land should be subjected to a lien for the increased value added to it, and no further. It may be that if the bankrupt was solvent, there should be judgment against him personally for the $1,400, with interest from date of the wrongful and fraudulent subtraction of that sum from his assets. But that point is not presented.

As to the questions raised upon the defendant's appeal, we think that in view of the full discussion on the three previous appeals, and on the trial below in this case, as to the allegations of fact upon which the defendants' exceptions are based, no further discussion is necessary.

As to both appeals we find

No error.

STATE EX REL. JULIA M. ALEXANDER v. EDGAR W. PHARR.

(Filed 5 May, 1920.)

Constitutional Law— Quo Warranto— Statutes— Legislative Powers— Courts—Title—General Assembly.

The Constitution of our State withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly, (Art. II, sec. 22), and an action of *quo warranto* will not lie under our statute. Rev., sec. 827, 828 (Consolidated Statutes, secs. 473, 474).

CLARK, C. J., not sitting.

CIVIL ACTION, transferred by the clerk of MECKLENBURG to *Harding, J.*, as upon demurrer.

This is an action of *quo warranto.*

The plaintiff states the case in her brief as follows: "This is a civil action of *quo warranto,* instituted by Julia M. Alexander, by leave of the Attorney General of North Carolina, under secs. 827 and 828, Revisal 1905 (secs. 473 and 474, Consolidated Statutes), and brought by the plaintiff to test the validity of the title of the defendant, Edgar W. Pharr, to the office of member of the House of Representatives of General Assembly of North Carolina, and to inquire into and determine the right of the defendant to hold said office."

There was judgment in favor of the defendant, and the plaintiff appealed.

Julia M. Alexander for plaintiff.

James A. Bell, Plummer Stewart, and Thaddeus A. Adams for defendant.

PER CURIAM. This Court is without jurisdiction, because the action is to try the title to a seat in the General Assembly of North Carolina, and the Constitution of the State (Art. II, sec. 22) provides "Each House (of the General Assembly) shall be judge of the qualifications and elections of its own members," thereby withdrawing the inquiry from the consideration of the courts.

This is the construction given to a similar section of the Constitution of the United States in *Britt v. Board of Canvassers,* 172 N. C., 797.

Affirmed.

CLARK, C. J., did not sit.

MARY LUCIA PEGRAM v. THE TOWN OF CANTON.

(Filed 2 June, 1920.)

Evidence—Pleadings—Nonsuit—Trials.

There being no evidence in this case to sustain the plaintiff's allegations of her cause of action, a motion of nonsuit was properly allowed.

CIVIL ACTION, tried before *Ray, J.*, at September Term, 1919, of HAYWOOD.

At the conclusion of the evidence a motion to nonsuit was allowed, from which the plaintiff appealed.

Craig & Craig and Marcus Erwin for plaintiff.

Felix E. Alley, J. Bat Smathers, and Martin, Rollins & Wright for defendant.

PER CURIAM. It is unnecessary to discuss or decide the question as to whether or not the defendant would be liable to the plaintiff if the allegations of the complaint had been established. The Court is unanimously of the opinion that there is not sufficient evidence to be submitted to the jury to establish the allegations of fact set out in the complaint, and that the motion to nonsuit was properly allowed.

Affirmed.

STATE v. SIMONS.

(Filed 5 May, 1920.)

1. Appeal and Error—Certiorari—Court's Discretion.

A writ of *certiorari* as a substitute for an appeal is not a matter of course when the appeal has not been prayed for, but within the exercise of the discretion of the court in passing upon the application.

2. Same—When Taken.

A petition for a *certiorari* as a substitute for an appeal to the Supreme Court should be made "at least at the call of the district" to which the appeal should have been taken, and it must appear that the petitioner was prevented from taking the appeal or was misled, or that he had a legal excuse for failing to file his petition earlier; and ignorance of the rules of practice or inability to employ counsel is insufficient.

3. Appeal and Error—Certiorari—Merits.

The merits of the case are not passed upon on an application in the Supreme Court for a *certiorari*.

4. Same—Criminal—Accessory Before the Fact—Statutes.

The petitioner for a *certiorari* as a substitute for an appeal was charged with arson, and upon the trial of another charged with the same offense,

and as an accessory before the fact, he testified of his own free will, after being warned and without inducement, that he had burned the dwelling, being induced thereto by the prisoner then being tried; and on his own trial, that he had not done the burning, etc.: *Semble*, this conflict of testimony involved a finding of fact that his first testimony was perjured; and further, the charge of accessory before the fact includes that of the principal crime, Rev., 3269, and the court could accept the plea of defendant under the charge of arson; and, therefore, no error of law would be found regarding the case as if on appeal, upon its merits.

PETITION for a writ of *certiorari* as a substitute for an appeal.

A true bill of indictment was returned against the petitioner at April Term, 1919, of ANSON, charging him with the crime of arson.

At the same term of court a true bill was returned against one Jim Reid (*S. v. Reid,* 178 N. C., 745), charging him in one count with the crime of arson and in another with being accessory before the fact to the crime of arson.

Reid was tried at said term, and the petitioner herein was the principal witness against him, and testified, among other things:

"I was living at Mr. N. P. Liles' place. John McLendon was living on Mr. Tyler Bennett's place. I had a talk here in town with Jim Reid in regard to burning this house. Jim said he wanted to get me to burn it.

"The first time I told him I couldn't do anything like that. That was a few days before the 18th, and on the 18th he got after me again down here at this barber shop of Mr. Whit Hagins. He got after me again, and said it would be all right; the house was insured and Mr. Bennett wouldn't lose anything, and said he would give me $150 if I would burn it. And I burnt the house that night.

"When they had the case up before the justice of the peace I voluntarily went up there and told it, didn't have any lawyer. Just went on the stand and told it, I wanted to tell it anyway. Mr. Roark was present. I heard his Honor say I need not tell anything against myself. No inducements have been given me, and no promises made me. I don't understand anything about why I am not being tried.

"I don't know whether I am interested in this trial or not. I just told the truth is why I am telling it."

Reid was convicted on the second count in the indictment, and was sentenced to life imprisonment in the penitentiary, from which judgment he appealed, and the case is reported in 178 N. C., 745.

At November Term, 1919, of said court, the petitioner tendered a plea of guilty of accessory before the fact to the bill of indictment charging him with arson, which plea was accepted by the State, and the petitioner was sentenced to the State's prison for life.

No appeal was taken from said judgment, and no notice of appeal given.

Appeals from the county of Anson were heard during this term of the Supreme Court, during the week beginning 13 April, and this petition for a *certiorari* was not filed until 20 April, 1920.

The petition is upon the ground that the bill of indictment charging arson does not include the crime of being accessory before the fact to the crime of arson, and that therefore his imprisonment is unlawful.

The petitioner alleges that he is innocent of the crime, and that he swore falsely on the trial of Jim Reid; that Reid did not procure him to burn the house, and that he had nothing to do with it and knew nothing about it.

He also alleges as an excuse for not taking an appeal that he was carried to Raleigh within two or three days after judgment was procured against him and has had no opportunity to give notice of appeal, and would not have known how to give such notice; that he has had no opportunity to consult with counsel, and because of poverty has been unable to protect his rights.

A. A. Tarlton and H. P. Taylor for petitioner.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

ALLEN, J. "One of the purposes of the writ of *certiorari* is to answer as a substitute for an appeal, . . . but where an appeal is not prayed for, the *certiorari* is not a matter of course, and the Court will exercise discretion in regard to the application." *Bledsoe v. Snow*, 48 N. C., 105; *McConnell v. Caldwell*, 51 N. C., 469.

The application should be made "at the term to which the appeal ought to have been taken," "without any unreasonable delay, and that any such delay after the earliest moment in the party's power to make the application must be satisfactorily accounted for." *Todd v. Mackie*, 160 N. C., 359.

It is also held in *Mitchell v. Baker*, 129 N. C., 63, that the petition for the *certiorari* should be made "at least at the call of the district" to which the appeal should have been taken.

Applying these principles, the petition must be denied, because it appears that it was not filed until after the appeals from the county of Anson at this term were heard, and there is no allegation which shows that the petitioner was prevented from taking an appeal, or was misled, nor is there any legal excuse given for failing to file his petition earlier.

If ignorance of the rules of practice or inability to employ counsel could avail there would be few cases in which a petition could not be applied for.

Again, while the merits are not determined upon a petition for a *certiorari,* it appears from the record that the application is made upon the ground that the petitioner swore falsely against another charged with the same crime, and that his claim now made that he is innocent has no foundation unless it is found that he now swears to the truth when he says in his petition that he has heretofore committed perjury in regard to the same fact.

If, however, these objections were not fatal to the application, it was held in *S. v. Bryson,* 173 N. C., 806, substantially overruling an earlier case, that the crime of accessory before the fact is included in the charge of the principal crime, within the meaning of sec. 3269 of the Revisal, and if so, the court could accept the plea of the defendant under the bill of indictment charging the crime of arson, and the judgment pronounced thereon is legal.

The petition must be denied.

Petition denied.

STATE v. J. E. CLINE.

(Filed 19 May, 1920.)

1. Indictment—Rape—Two Offenses—Election—Courts Discretion.

Where two acts of the defendant are charged against him under an indictment for rape, the matter of the State electing as to one of them is within the sound discretion of the trial judge, and no abuse thereof appears when the two acts are mixed and dependent on each other, and under the attendant circumstances it would be impracticable to confine the prosecutor to one without seemingly destroying a *prima facie* case of guilt.

2. Rape— Criminal Law— Evidence— Questions for Jury— Nonsuit— Trials.

Held, the evidence in this action of rape is sufficient to be submitted to the jury, but not discussed as a new trial is awarded.

3. Instructions—Recital of Evidence—Statutes—Appeal and Error.

As to whether, under the circumstances of this case, the trial judge committed error in not sufficiently stating the evidence in the case to the jury as required by Rev., 535, *Quaere?* Brown, J., writing the principal opinion; Walker and Hoke, J.J., holding the view that a new trial should be granted upon the insufficiency of the evidence to convict of the charge of rape; and Allen, J., and Clark, C. J., dissenting upon the ground that the judge was not in error as to his statement of the evidence to the jury.

WALKER and HOKE, JJ., concurring in part; ALLEN, J., dissenting; CLARK, C. J., concurring in the dissenting opinion.

STATE *v.* CLINE.

INDICTMENT for rape, tried before *McElroy, J.*, at September Term, 1919, of FORSYTH.

There was a verdict of guilty, and sentence of death pronounced. Defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Holton & Holton, Sapp & McKaughan, and Benbow, Hall & Benbow for defendant.

BROWN, J. The defendant was convicted of the crime of rape committed upon the person of Bessie Conrad, a young girl about 18 years of age, who, if the evidence is to be believed, is a girl of good character and well known to defendant, who lived next door to her parents.

1. The evidence for the State disclosed that two acts of sexual intercourse, alleged to be rape, took place.

The defendant moved that the State be required to elect upon which it would rely for conviction.

The court overruled the motion.

S. v. Parish, 104 N. C., 679, is direct authority, it seems to us, sustaining the judge. The matter of election is committed to the sound discretion of the judge. The evidence of the two acts here is so mixed and dependent on each other, with its attending circumstances, that it would not be practicable to confine the prosecutor to one transaction without destroying what seems to be *prima facie* case of guilt against the defendant.

2. At close of the evidence defendant moved to nonsuit the State upon the ground that the evidence is insufficient to be submitted to the consideration of the jury.

The majority of the Court are of opinion that the motion was properly overruled, and that it was the duty of the judge to submit the evidence to the jury for their consideration. We will not discuss it, as there is to be another trial.

The court, in charging the jury, failed to state in a plain and correct manner the evidence given in the case, and in not declaring and explaining the law arising thereon. But, on the contrary, expressly stated: "Much testimony has been offered which I will not attempt to rehearse, as it is your province to remember the evidence, and it is your duty to weigh and believe or disbelieve it, in whole or in part, and if so, what part is respective of the contentions of the State and of the defendant. It is your duty to remember the evidence."

The case on appeal is signed by the judge, and the above exception is stated over his signature, and is duly assigned as error.

We think the exception is well taken.

It does not appear in the record that the learned judge attempted to state the evidence as required by the statute, and it does not appear that it was waived by defendant. Sec. 535 of the Revisal provides: that in charging the jury, the judge "shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon."

This statutory requirement, enacted first in 1796 has been regarded as mandatory, and as imposing upon the judge a very important and necessary duty. The purpose of it is to aid the jury in remembering the evidence, although they are not bound by the judge's version of it, as well as to have the law made intelligible to the jury.

In *S. v. Rogers,* 93 N. C., 523, the Court says: "It is held as a general rule that an omission on the part of the judge to charge the jury on a certain point is not error unless he is requested to do so. But when the judge, in his charge, fails to state in a precise and correct manner the evidence given in the case, and explain the law arising thereon, as he is required to do so by sec. 413 of the Code, there is error. There are so many decisions in our reports construing this statute and pointing out the duty of the courts under its provisions that we are at a loss to conceive why a judge should fail to comply with its directions."

It is true that the defendant should have asked for specific instructions if he desired the case to be presented to the jury by the court in any particular view, but, as said by *Mr. Justice Walker* in *Simmons v. Davenport,* 140 N. C., 412, this rule "does not of course dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence given in the case, and explain the law arising thereon." But we do not mean to imply that the judge is obliged to repeat all the evidence to the jury. We bear in mind what is said by *Judge Gaston* in *S. v. Haney,* 19 N. C., 390: "The judge is not bound to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions which they have to investigate, and to explain the law applicable to the case, and this particularly when he is not called upon by counsel to give a more full charge."

This is repeated and approved in *Boon v. Murphy,* 108 N. C., 191.

It is especially important for the benefit of the State as well as for the protection of the defendant that in the trial of capital felonies the requirements of the statute shall be carefully observed.

New trial.

WALKER and HOKE, JJ., concurring in part: On careful perusal of the record, we are of opinion that the facts in evidence do not disclose

that degree of force required by the law to constitute the capital offense of rape, and that the trial judge should have so ruled.

Holding this view, we concur in the position that in any event there should be a new trial of the issue.

ALLEN, J., dissenting: A new trial is ordered upon the ground that the judge, before whom the action was tried, failed to recapitulate the evidence, and is based upon the following excerpt from the charge: "Much testimony has been offered which I will not attempt to rehearse."

This statement, standing alone, would create the impression that the judge did not state the evidence or the contentions of the parties, but when read in connection with the context it means nothing except that all of the evidence had not been recapitulated. The statement follows four pages of a charge, in which all of the evidence was referred to, and every contention of the parties stated. The charge is unusually clear, full, fair, and accurate, and a failure to further recapitulate the evidence was a favor to the defendant, instead of being injurious to him, because he offered no evidence, and a repetition of the evidence for the State would have been simply to again call the attention of the jury to evidence against him.

It was doubtless for this reason that the defendant did not ask for further instructions, and I need not go further than the cases cited in the opinion to show that it has been the uniform ruling of this Court that an objection to a failure to recapitulate evidence will not be considered, when made after verdict, and when there has been no request for further instruction, as in this case.

In *Simmons v. Davenport*, 140 N. C., 412, the next sentences after the one quoted in the opinion is as follows: "But a party cannot ordinarily avail himself of any failure to charge in a particular way, and certainly not of the omission to give any special instruction, unless he has called the attention of the court to the matter by a proper prayer for instructions. So if a party would have the evidence recapitulated, or any phase of the case arising thereon, presented in the charge, a special instruction should be requested." And in *S. v. Haney* (19 N. C., 390), the second exception was "Because the judge recited the testimony for the prosecution, and did not recite that for the defense"; and a new trial was denied although the Court states that "it appears from the judge's charge, which is spread upon the record, that his Honor did not undertake to recapitulate the evidence to the jury, but only to direct their attention to the important questions which they were called upon to investigate; and to explain to them the law applicable to the case." The *Davenport case* goes further and says: "In *Boon v. Murphy* the respective duties of the judge and counsel under the act of 1796 (Rev., 535) are clearly and fully defined, and it is now commended as a safe guide in practice."

When we turn to *Boon v. Murphy* (108 N. C., 191), we find it was held in that case that, "When the facts are simple, or the judge 'directs the attention of the jury to the principal questions they have to investigate,' as here, by stating the respective contentions of the parties, the failure to recapitulate the evidence is not error."

This last case, which is commended as "a safe guide" in the *Davenport case,* is of special importance, as it declares that failure to recapitulate the evidence is not error when the respective contentions of the parties are stated, and it will not be contended this was not done in this case.

Many other authorities could be cited to the same effect, but these are, I think, sufficient to show that a new trial ought not to be granted because of failure to recapitulate the evidence, when the defendant has made no request for further instructions.

If we had the right to weigh the evidence, I would be strongly inclined to join *Walker* and *Hoke, JJ.,* in setting aside the verdict, because there is much evidence to discredit the prosecutrix, but we have no such power, and she testified as to the first act of intercourse: "I pushed him—tried to push him back, but could not. I tried to push him back, but could do nothing with him." And as to the second, "He asked me to lay down, and I told him I would not do it, and he picked me up and throwed me down, and tore my underclothes off."

If true, this is rape, and the jury alone has the right to decide the question.

What was said in *Harris v. Turner, ante,* 322, and quoted by *Walker, J.,* in *Forester v. Betts, ante,* 608 and 681, in my judgment covers the whole case. "The Court said: "Jurors are not bound to accept as true all the testimony offered by the plaintiff or the defendant, but can accept a part and reject the remainder, being the sole judges of the testimony, and what it tends to prove, including the credibility of witnesses.

"If a party desired fuller or more specific instructions than those given by the court, he must ask for them, and not wait until the verdict has gone against him, and then for the first time complain that an error was committed."

CLARK, C. J., concurs in the opinion of ALLEN, J.

STATE v. T. A. RAZOOK.

(Filed 12 May, 1920.)

1. **Criminal Law—Mayor's Court—Appeal— Bill— Warrant— Solicitor's Discretion.**

It is within the discretion of the solicitor to send a bill to the grand jury on appeal from a judgment of the mayor of a town imposing a penalty for the violation of its ordinance, instead of trying the case on the warrant.

2. **Municipal Corporations—Cities and Towns—Ordinances—Publication —Actual Notice—Criminal Law.**

The requirement of the charter of a city or town that its ordinances shall be printed and published, is to bring it to the attention of the public, and where personal notice has been given to an offender thereunder who afterwards commits the offense prohibited, the requirement of publication, etc., is not necessary for a conviction.

3. **Municipal Corporations—Cities and Towns—Ordinances—Certification —Evidence—Statutes.**

The certification of a town ordinance as required by Rev., 1595, is only *prima facie* evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the official records of the town by the proper officer, which shows its passage.

4. **Evidence—Nonsuit—Municipal Corporations—Cities and Towns—Ordinances.**

Where it is shown by the defendant's own evidence that he was knowingly engaged in the business of auctioneering in a town without having taken out the license required by a valid ordinance, a judgment as of nonsuit will be refused.

5. **Municipal Corporations—Cities and Towns—Ordinances—Penalties— Statutes.**

The violation of a valid town ordinance is made a misdemeanor by Rev., 3702, and the defense that the ordinance did not prescribe a penalty therefor, is untenable.

6. **Constitutional Law—Discrimination—Taxation—Ordinances—Municipal Corporations—Cities and Towns.**

A town ordinance requiring a license tax from those selling merchandise at auction within the town limits, whether conducted within or without a building is not rendered discriminatory by the violator thereof being the only one in the town engaged in the business, or by a provision excepting a person thus selling his own goods, not more than one day in six months.

7. **Constitutional Law—Taxation—License Tax—Prohibition—To Business—Municipal Corporations—Cities and Towns—Ordinances—Evidence—Questions for Jury.**

While a town ordinance imposing a tax upon one conducting a business of auctioneering within its limits may not place the tax so unreasonably high as to prohibit a lawful business, the statement of the amount of the

penalty alone may not ordinarily be sufficient to prove its invalidity as a matter of law, and it is *Held*, under the circumstances of this case, it would have been a question of fact for the jury had the defendant relied thereon as a defense and presented his evidence; and *semble*, the Court gave the defendant the benefit of setting up a *bona fide* belief in defense of the action, by suspending judgment and imposing a small fine, etc.

APPEAL from *Webb, J.*, at September Term, 1919, of HENDERSON.

The defendant was convicted on an appeal from the mayor of the town of Hendersonville of auctioning goods without having obtained a license as required by the ordinance of said town. On appeal the solicitor sent a bill of indictment instead of trying on the warrant. Beyond an exception to evidence, the only question presented is the validity of the ordinance. Ordinance No. 76 of the town specifies among the privilege taxes levied upon the business, trades, and professions operated within the city of Hendersonville, that "Every person, firm, or corporation engaged in the business of selling any kind of merchandise, at auction, within the corporate limits of the city of Hendersonville, whether said business is conducted within or without buildings, shall pay a license or privilege tax of $400," and requires that before offering to sell any goods at auction he shall obtain from the treasurer of the city a license for one year, which shall be revocable by the commissioners, for good cause shown, with provision that the treasurer before issuing the license shall make diligent inquiry as to the character, reputation, and business methods of the applicant, and that if the treasurer shall refuse to grant the license, the applicant shall have the right to lay his application before the mayor and board of commissioners, and if they shall refuse to order license to issue, the applicant may appeal to the resident judge of the district, and if he shall refuse, then the applicant may have his petition passed upon by a jury in the Superior Court, with further provision that the ordinance shall not apply to judicial sales, or sales to wind up estates, or to sales conducted by a citizen, not regularly engaged in auctioneering, to dispose of household goods, or other goods and animals, such sales not to last beyond one day in six months.

The legislative authority under which the ordinance was enacted is sec. 32, ch. 352, Pr. Laws, 1913, and is as follows: "The city shall have power to license, tax, and regulate merchants, commission merchants, hotels, inns, boarding-houses, restaurants, markets, brokers, money brokers, auctioneers and auction houses, and stores or shops where the principal business is selling goods by auction, itinerant merchants, or peddlers, pawnbrokers, junk dealers, and junk-shops, dealers in second-hand goods and merchandise of any kind, and all other business or trades or occupation as may be the proper subject of police tax or license

regulation; and may pass appropriate ordinances with appropriate penalties for the enforcement or collection of such tax, license, or regulation."

From the verdict and judgment the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

McD. Ray and O. V. F. Blythe for defendant.

CLARK, C. J. Whether the solicitor should send a bill to the grand jury and try the defendant upon the indictment, or upon the original warrant, was a matter entirely within his discretion. *S. v. Quick*, 72 N. C., 243; *S. v. Crook*, 91 N. C., 542; *S. v. Thornton*, 136 N. C., 616.

The first assignment of error is that the Court permitted the introduction of the ordinance, though it was not printed and published as required by the city charter. This was required to bring notice of the ordinance to the attention of the public, but it is shown here, and not contradicted, that personal notice of the ordinance was served on the defendant. The defendant further excepted because the paper-writing was not certified by the mayor, as required by Rev., 1595. But that section merely provides that such certificate shall be *prima facie* evidence, and such certificate is not necessary when the ordinance is proven, as here, by the production by the proper officer of the official records of the town, showing its passage and the entry on the records of the ordinance itself.

The other assignment of error is to the refusal of a judgment of nonsuit. Upon the defendant's own testimony he was doing business as an auctioneer, without taking out license, as required by this ordinance; and he continued his sale of goods by auction after personal notice of its existence and purport.

Nor is it any defense that the ordinance does not prescribe the penalty for its violation, for under Rev., 3702, the violation of a valid ordinance is a misdemeanor. The evidence was sufficient to be submitted to the jury, that the auctioneering done by the defendant was a violation of the ordinance.

The defendant further contends that the ordinance was invalid because discriminatory and unreasonable. It was not discriminatory on its face, for it applies to every person, firm, or corporation engaged in selling by auction any kind of merchandise in the city of Hendersonville conducted within or without buildings. It is immaterial whether or not the defendant was the only person in the town of Hendersonville whose principal business was auctioning goods. The exception of a person selling his own goods, not more than one day in six months, is not a

discrimination, for the license tax is on the business. *S. v. Kirkpatrick, post,* 747.

Nor does it appear that the ordinance was unreasonable. The town clearly had the legislative authority under sec. 32, ch. 352, Pr. Laws 1913, to impose such tax. While this does not authorize a license fee so high as to amount to a prohibition of the particular business, 4 Cyc., 1039, we could not hold as a matter of law that in a town the size of Hendersonville, a well known summer resort, the tax here required ($400) is so unreasonable as to prohibit the business, in the absence of evidence to that effect.

In 17 R. C. L., 537, it is said: "Ordinarily, however, this discretionary authority in respect of licenses is conferred on the municipal authorities, and it is a rule that whether the license be imposed as a police regulation or as a revenue measure the courts will not review the action of the lawmakers unless an abuse of such discretion is obvious."

In *Minnesota v. Martin,* 51 L. R. A. (N. S.), 40: "If, however, it be conceded that the courts have power to declare a municipal ordinance levying a license tax on business invalid on the ground that the tax imposed is so oppressive and unreasonable as to amount to confiscation, rather than taxation, they will not determine the question by mere inspection of the amount of the tax imposed. All presumptions and intendments are in favor of the validity of the tax; . . . in other words, the mere amount of the tax does not prove its invalidity."

The defendant testified that he did not sell more than one-fifth of his goods by auction, and contends that his principal business was not selling goods by auction, and therefore the tax upon him was not authorized by the statute, but there was evidence for the State that he carried on the auctioneering day and night up to 9 and 10 o'clock at night; that at his auctions his place of business was crowded and that he had no counters in his store, and did not sell goods like merchants. This was a question of fact for the jury, and he did not ask a finding upon it in his favor. Besides, the authority conferred by the statute is to license not only "stores and shops where the principal business is selling goods by auction," but also upon "auctioneers and auction houses."

The defendant did not tender evidence nor ask the court to instruct the jury that the fine was excessive or unreasonable, or intended to prohibit the business, or that it was discriminatory. If the defendant was making his defense in the *bona fide* belief that the ordinance was invalid, the court gave him the benefit of his contention by suspending the judgment upon the payment of a fine of $5, and the payment of the license fee prescribed by the statute.

No error.

STATE v. HALLMAN FINK.

(Filed 12 May, 1920.)

1. Taxation—Automobiles—Motor Vehicles—Municipal Corporations—Void Ordinances—License Tax.

A license tax imposed upon those running an automobile for hire by a municipal ordinance in excess of that allowed by a valid statute is void and unenforcible.

2. Taxation — Statutes — Amendments— Interpretation— Automobiles—Motor Vehicles—License Taxes—Municipal Corporations—Ordinances.

Sec. 6, ch. 140, Laws of 1917, entitled "An act to regulate the use of automobiles," required a license or registration fee rated according to horse power, and puts a limit upon the total registration fee authorized to be charged by a municipal corporation, that it should not be greater than one-half the fee required by the State, was repealed by ch. 189, Laws of 1919, being entitled "An act to provide for the construction and maintenance of a system of highways in the State and to enable the State to secure the benefits of Federal Aid therefor and for other purposes," and by sec. 5, raised the license fees to be paid to the State, graduated also as to horse power, and further, that "motor vehicles used for carriage of passengers for hire shall carry a special 'service' license to be issued by the Secretary of State, for which the license fee shall be twice the amount for like motor vehicles for private use," and that "no county, city or town shall charge any license fee on motor vehicles in excess of one dollar per annum." A city ordinance passed in pursuance with its charter, required a license tax of twenty dollars for running a motor vehicle for hire, and being in excess of the one dollar license fee allowed in the substituted statute, is void.

3. Taxation— Statutes— Municipal Corporations— Ordinances— License Tax—Criminal Law.

Since the passage of ch. 189, Laws of 1919 (sec. 5) a city ordinance imposing a license tax of over one dollar a year for those running motor vehicles for hire, is void, though authorized by the city's charter, and where the person so operating them has complied with the statute, he may not be convicted of the offense imposed by the ordinance.

4. Statutes— Taxation— General Powers— Particular Powers— License Tax—Municipal Corporations—Repeal.

The particular intent expressed in ch. 189, Laws of 1919 (sec. 5) forbidding counties, cities and towns from imposing a license tax in excess of one dollar a year on those running a motor vehicle for hire, controls a general power prior conferred in a municipal charter, to levy a franchise or license tax thereon.

5. Taxation—Statutes—License Tax—Restrictions—Automobiles—Ownership—Hire—Municipal Corporations.

The Laws of 1919, ch. 189, sec. 5, imposes a privilege tax for operating motor vehicles for private use and for carrying passengers for hire, restricting the imposition of a privilege tax in excess of one dollar a year by a municipality upon each class alike.

STATE *v.* FINK.

CRIMINAL ACTION, determined on special verdict before *Shaw, J.*, at January Term, 1920, of CABARRUS.

The charge is for operating an automobile for hire in the city of Concord without the city license, and without having paid the license tax of $20 imposed by the city authorities for the privilege, etc.

The facts relevant to the issue, and the decision of the court thereon, are embodied in the judgment as follows:

"It is admitted that the city of Concord is a municipal corporation chartered and existing under the private State laws of North Carolina, session 1907, chapter 344.

"The city of Concord, at its April meeting, 1919, passed the following ordinance:

"Be it ordained by the board of aldermen of the city of Concord that by authority of the charter of the city of Concord and the laws of North Carolina, the following amounts are hereby assessed, levied, and taxed against and upon each of the occupations or businesses herein named, as a privilege license tax, payable in advance, with the right reserved by the said board to revoke its license any time that the licensee shall be convicted in a police or justice's court of violating any of the ordinances regulating the operation or manner of conducting said business, said amounts to be paid for the privilege of doing business in the city of Concord, from 1 May, 1919, to 1 May, 1920, to wit: Automobile for hire, each, not over 25 cents, except special contract, $20.

"It is admitted that Hallman Fink operated an automobile for hire within the city of Concord to carry passengers in said city at 25 cents each, with additional charges for special contract, without having applied for or obtained a city license as required by said ordinance.

"But he did tender to the city tax collector of the city of Concord the sum of $1, as provided by ch. 189, sec. 5, Public Laws of 1919. It is admitted that Hallman Fink had paid all taxes provided for in sec. 5, ch. 189, Public Laws of 1919, and the said Hallman Fink had displayed upon his said car the numbers of the special service license furnished by the Secretary of State, as provided in said ch. 189, Public Laws of 1919.

"It is admitted that the Private Laws of North Carolina, session 1907, amendment to charter of the city of Concord, sec. 50, subsec. (d) of ch. 344, contains the following:

" 'To regulate, control, tax, and license all franchises, privileges, business, trades, professions, callings, or occupations, which are now or may hereafter be taxed by the laws of the State of North Carolina, by imposing a franchise, license, or privilege tax upon each and every one of the aforementioned subjects in such amount as the aldermen may deem proper, not to exceed one thousand dollars.'

"It is admitted that the form of license issued by the city is in the following words and figures:

" 'Corporation privilege license—city of Concord (not transferable).

" 'Received of John Doe, twenty dollars in full for privilege tax. License is hereby granted to said party above named for the privilege of carrying on the business of auto hire within the corporate limits of the city of Concord, N. C., for the year ending 1 May, 1920.

R. F. MILLS,
City Tax Collector.'

"The jury having been duly sworn and examined, find the foregoing facts as a special verdict; and if, upon said facts the court is of the opinion that the defendant is guilty, the jury find the defendant guilty; but, if upon said foregoing statement of facts the court is of the opinion that, as a matter of law, the defendant is not guilty, then we, the jury, find the defendant not guilty."

The judgment of the court was "that the defendant is guilty; that he pay the city license tax of $20, a fine of $5, and the costs."

Defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Maness & Armfield for defendant.

HOKE, J. In the recent case of *S. v. Prevo*, 178 N. C., 740, it was held that, in order to a conviction, on a charge of this general character, it was necessary to show a violation of a lawful ordinance, and further, that a town or city ordinance in contravention of a valid State statute on the subject is void.

Considering the record in view of these principles, it appears that sec. 6 of Laws 1917, ch. 140, entitled an act to regulate the use of automobiles, a license or registration fee is established for the use of motor vehicles, rated according to specified horse-power, and containing the proviso that "no county, city, or town may require a total registration fee in an amount greater than one-half the fee required by the State."

This regulation is repealed in ch. 189, Laws 1919, and sec. 5 of the later act provides, in part, as follows: "That section six of chapter one hundred and forty of the Public Laws of one thousand nine hundred and seventeen be stricken out, and the following inserted in lieu thereof: 'That a license or registration fee shall be charged and collected annually on motor vehicles registered under the provisions of this act, on each motor vehicle, except motor trucks, motor vehicles for the carriage

of passengers for hire, and motorcycles, as follows: On each motor vehicle having a rating of twenty-six horsepower or less, a registration license fee of ten dollars; on each motor vehicle having a rating of more than twenty-six horsepower, but not more than thirty horsepower, a registration or license fee of fifteen dollars; on each motor vehicle having a rating of more than thirty horsepower a registration or license fee of twenty dollars; that each motor vehicle used for the carriage of passengers for hire shall carry a special "service" license to be furnished by the Secretary of State, for which the license fee shall be twice the amount fixed for like motor vehicles for private use.' "

After making definite regulations for a tax on motorcycles and motor trucks the section contains the proviso: "That no county, city, or town shall charge any license fee on motor vehicles in excess of one dollar per annum." It will thus be noted that, in the substituted section, the tax is rated according to power, and further, motor vehicles are in part classified into those operated for private use and those for the carriage of passengers for hire, the latter being charged twice the amount of the former, and to have issued them a service license "by the Secretary of State," and with the proviso, as stated, "that no county, city, or town shall charge any license fee greater than one dollar." This later section, containing the rule which now prevails on the subject, is taken from ch. 189, Laws 1919, entitled, "An act to provide for the construction and maintenance of a system of highways in the State, and to enable the State to secure the benefits of Federal aid therefor, and for other purposes." The object of the law as indicated being to create a State Highway fund by placing on the operating of motor vehicles a tax as large as it would reasonably bear; thus affording to the State a substantial sum for the extensive highway improvements contemplated by the act, and to meet and secure the aid of the Federal Government proffered on condition that a sufficient response be made by the State authorities. And it is the evident meaning and purpose of the statute that the great bulk of the tax to be raised from this source shall go to the "State Highway fund," the local tax of $1, which may be imposed by counties, cities, and towns, being allowed, no doubt, to meet the expense and to secure the benefits of local supervision, as to the personnel and methods of local operators, and probably also to establish something like uniformity of local rates, to be imposed upon this important and growing business.

It is insisted for the State that the license fee, provided for in the public law, is one of ownership merely, and in no way affects the provision in the charter of the city of Concord, Private Laws 1907, ch. 344, empowering its authorities to "regulate, control, tax, and license all franchises, privileges, business, trades, professions, callings, occupations,

etc., by imposing a franchise license or privilege tax upon each and every of the aforementioned subjects," etc. But, in our view, the tax imposed in the general law is a license tax for the privilege of operating motor vehicles:

1. For private use.

2. For carrying passengers for hire, and is one and the same kind of tax formerly authorized under the city charter that is a franchise, license, or privilege tax. It is stated in the ordinance that the tax of $20 is imposed for privilege of operating an automobile for hire, and this being true, the force and effect of the State law, regulating the use and operating of automobiles for hire, is to withdraw motor vehicles for hire from the power to tax this occupation, as conferred generally in the charter, and limits the power for this purpose to a tax of $1, as the later State statute clearly and in express terms provides. These statutes appertaining to the same subject are to be construed together, *Keith v. Lockhart,* 171 N. C., 451, and, by correct interpretation, the particular intent expressed in the later State statute will control the power conferred generally in the charter and constituting the business of operating motor vehicles for hire an exception, with the tax thereon restricted to one dollar. *Rankin v. Gaston County,* 173 N. C., 683; *Bramham v. Durham,* 171 N. C., 196; *School Comrs. v. Aldermen,* 158 N. C., 191-198.

In the *School Comrs. case, supra,* the principle is stated as follows: "When a general intent is expressed in a statute, and the act also expresses a particular intent incompatible with the former, the particular intent is to be considered in the nature of an exception," citing 1 Lewis Sutherland as State Construction (2 ed.), sec. 268; *Rodgers v. U. S.,* 185 U. S., 83; *Stockett v. Byrd,* 18 Md., 484; *Dahuke v. Roper,* 168 Ill., 102, and authoritative cases on the subject elsewhere are to the same general effect. *Barrett v. New York,* 189 Fed., 268; *Buffalo v. Lewis,* 192 N. Y., 193; *Newport v. Merkel Bros.* (Ky.), 161 S. W., 549; *Helena v. Dunlap,* 102 Arkansas, 131.

The city authorities, therefore, being without power to impose a license tax on this business greater than $1, the ordinance by which they undertake to collect a tax of $20, contrary to the provisions of the general law, must be declared void, and the prosecution predicated upon it necessarily fails. *S. v. Prevo,* 178 N. C., 740, citing *S. v. Webber,* 107 N. C., 962.

There is error, and this will be certified that, on the facts found, a verdict of not guilty be entered, and defendant be discharged.

Reversed.

STATE v. H. R. SESSOMS.

(Filed 18 February, 1920.)

Appeal and Error—Courts—Discretion—Evidence.

Upon trial for selling intoxicating liquors in violation of our statute, after the defendant and his witnesses had testified in his behalf and in rebuttal, a State's witness testified that he was present and had seen the sale charged. The defendant offered himself and his witness to contradict this witness, and the Court refused, stating in the presence of the jury that the defendant and his witnesses had already testified as to this fact. *Held*, the refusal of the judge was a matter within his discretion in the conduct of the trial, and there being no evidence of its abuse, it was not reviewable on appeal.

INDICTMENT for selling liquor, tried before *Lyon, J.*, at November Term, 1919, of TYRRELL.

The defendant was convicted, and appealed to the Supreme Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Meekins & McMullan and J. E. Alexander for defendant.

BROWN, J. The defendant was convicted under a bill charging the sale of spirituous liquor to one Anthony Spruill, with a count for having them in his possession for purposes of sale. Anthony Spruill testified that the defendant sold him a pint of intoxicating liquor, for which he paid him $2.50. This was denied by the defendant, who was examined as a witness in his own behalf. In rebuttal, one William Marriner testified for the State that he went with Anthony Spruill to the defendant's house, and also bought from the defendant at the time a pint of liquor, and paid him $2.50. The State closed.

The defendant then offered himself as a witness, and other witnesses, for the purpose of showing that William Marriner did not come to his house with Anthony Spruill, and that he sold Marriner no liquor that night. His Honor stated, in the presence of the jury, that the defendant and each of his witnesses, in their examination, had been specifically asked to name each of those present at the house, and they had done so, and they had denied that William Marriner was there, or that he had gotten any liquor, and that there was, therefore, no need for them to return to the stand to again deny it, and in the exercise of his discretion declined to permit them to again go on the stand. To this ruling by his Honor defendant excepted.

This is the only exception in the record. It appears that counsel for the defendant, in arguing the case to the jury, referred to the fact that

the testimony of William Marriner had been denied by the defendant and his wife, and each of his witnesses who had testified that he was not there that night, and of course if he was not there he could not have bought any liquor, and so argued to the jury.

The mode of conducting the trial is in the discretion of the trial judge, and the exercise of discretion is not reviewable unless it appears that there has been an abuse of the discretion, in such way as to be prejudicial to the defendant. *S. v. Cobb,* 164 N. C., 422; *S. v. Moore,* 104 N. C., 743; *S. v. Hodge,* 142 N. C., 676; 16 Corpus Juris, 806; *S. v. Sutherland,* 100 S. E., 187.

We see no evidence of an abuse of discretion, as the court stated to the jury practically that the defendant and his witness had denied that William Marriner was at the house, or that he had gotten any liquor from the defendant. In addition, counsel for the defendant argued this to the jury. The matter of allowing the defendant and his witness to be recalled was in the sound discretion of the judge, and we see no abuse of such discretion.

No error.

STATE v. W. E. PERRY AND HERBERT HORTON.

(Filed 25 February, 1920.)

Intoxicating Liquor — Manufacture — Evidence— Questions for Jury— Trials.

Testimony tending to show that the defendants came in the early morning to a place where everything was complete for the illicit manufacture of intoxicating liquor except the still itself, which they brought and placed on the furnace already there, and cut wood and did other acts for operating the distillery, is not solely evidence of an intent to commit the unlawful act, but circumstantial of the fact that the defendants were engaged in this unlawful business, and sufficient for the determination of the jury.

APPEAL by defendants from *Connor, J.*, at the Fall Term, 1919, of CHATHAM.

Indictment for manufacturing intoxicating liquor, and aiding and abetting in same. The defendants were convicted and appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. P. Horton and A. C. Ray for defendants.

BROWN, J. The only error assigned is the judge's failure to give judgment as of nonsuit against the State. The evidence is as follows:

"Rev. George Perry testified that he is now and was during the month of September, 1919, the pastor of the Methodist Episcopal Church at Bynum, in Chatham County; that for the purpose of aiding in the enforcement of the law prohibiting the manufacture and sale of intoxicating liquor, he had accepted an appointment as a deputy sheriff of Chatham County; that on the night of the 7th of September, 1919, in consequence of information which came to him, he, with five other citizens of the community, went to a place in the woods in Chatham County, where they found several boxes of still beer, which was in proper state of fermentation for being converted into whiskey; that nearby they discovered a furnace, under which were ashes and coals; that there were buckets and tools at the place, and around the furnace there were tracks and paths indicating that there had been several persons there. That he and the members of his party concealed themselves, and about 2 o'clock in the morning of September 8th Mid Cooper and the defendant Herbert Horton came to the place where the boxes of beer and the furnace were, bringing with them a whiskey distillery which they placed on the furnace; that the said Cooper and defendant Horton remained there some time, both being engaged in setting the distillery in order, connecting up the different parts, adjusting the cap upon the still, and collecting wood; that after examining the beer they both left. That the witness and members of his party remained in the woods, concealed, until some time thereafter, when the defendants, Perry and Horton, came back to the distillery. Cooper did not return with them; that both defendants began to work about the distillery, cutting and gathering wood, and placing same near the furnace; that they inspected the beer from time to time; that while they were thus engaged witness and members of his party attempted to arrest both defendants; both defendants, however, fled when they saw witness and his party, and escaped."

The defendants set up an alibi. There was evidence offered by the State tending to corroborate the evidence of the witness Perry. The learned counsel for the defendant very earnestly contend that this evidence is not sufficient to justify the submission to the jury the determination of the guilt of the defendants in that it fails to identify the defendants or to prove that they were engaged in the manufacture of intoxicating liquor. We have listened to their argument and weighed it carefully. It is true, as contended by them, that one who has a mere intent to commit a crime is neither guilty of the crime intended, nor any other crime. But the testimony in this case offered for the State tends to prove something more. It does not necessarily convict the defendants of the manufacture of intoxicating liquor, but all the circumstances, taken as a

whole, are amply sufficient to go to the jury to be considered and weighed by them in determining the guilt or innocence of the defendants. This evidence tends to prove that the witness Perry, with others, went to a place in the woods where it was suspected the illicit manufacture of liquor was carried on. They found boxes of still beer in fermentation for conversion into whiskey. Nearby they discovered a furnace under which were ashes and coals—all the implements necessary for the distillation of liquor were present. Around the furnace were tracks and paths, indicating that several persons had been there. The witness Perry and others with him concealed themselves in the neighborhood of the still and about 2 o'clock in the morning the defendants came to the place where the beer and furnace were, with a distillery which they placed on the furnace.

It is useless to recite more of the testimony of the witness. The entire evidence is set out and speaks for itself.

We are all of opinion that the learned judge of the Superior Court did right in submitting the guilt or innocence of the accused to the jury. It is not necessary for the State to prove directly that the distillery was in operation at that very moment. The circumstances in evidence are sufficient to warrant the jury in coming to the conclusion that the defendants were engaged in the business of illicit distilling.

No error.

STATE v. GREENVILLE PUBLISHING COMPANY AND JAMES H. MAYO, EDITOR.

(Filed 10 March, 1920.)

1. Libel and Slander—Public Officers—Publication—Qualified Privilege—Falsity—Implied Malice.

It is to the public interest that the conduct and qualifications of officials and candidates for public office be subjected to free and fair criticism and discussion by their constituents, and such presents a case of qualified privilege, and to convict of libel for defamatory publication of this character, by a newspaper and its editor, it must be shown that it is both false and malicious, its falsity not of itself sufficient to establish malice, there being a presumption that the publication was made in good faith.

2. Same—Criminal Actions—Burden of Proof—Quantum of Proof.

The malice to sustain a criminal prosecution for libel of public officials is not necessarily that of personal ill will or malevolence, and it may exist, in such cases, from some ulterior motive and inferred when the defamatory statement is knowingly false or without any reasonable grounds to believe in its truth, or, at times, from the character and cir-

cumstances of the publication itself, and the statements, as in actions of this character being qualified privilege, the burden is on the State to show throughout the trial, beyond a reasonable doubt, that the defamatory charge is both false and malicious.

3. Same—Instructions—Appeal and Error.

In a criminal prosecution against a newspaper and its editor, for publishing a libel against a sheriff standing for re-election, charging in effect that the prosecutor had been unlawful and criminally negligent in the performance of his official duties in reference to enforcing the statutory provisions applicable to deserters and slackers, under the Federal Draft Act, though the publication contained a charge of a crime, yet being a case of qualified privilege, it was reversible error for the judge to charge the jury that the law would imply malice and place on defendant the burden of repelling the imputation.

4. Same—Newspapers—Editors—Evidence—General Complaint.

In a criminal action for libel against a newspaper and its editor for publishing a statement that the sheriff of the county, standing for re-election, was unfaithful and criminally negligent in the performance of his official duties under the Federal Drafts Act as to deserters and slackers, etc., evidence is competent that there was a general complaint to that effect, in the county, as tending to show good faith on the part of the defendant in making the publication, though ordinarily not competent to show the truth of the defamatory charge, and its exclusion by the court is erroneous.

5. Slander—Inferior Courts—Justices of the Peace—Committing Magistrates—Indictment—Statutes.

Where a local statute has established an inferior county court, declaring slander and certain other offenses committed to its jurisdiction petty misdemeanors, and provides that the same may be tried by the warrant of a justice of the peace acting as a committing magistrate, and also conferring authority on the judge of the inferior court to transfer any and all causes to the Superior Court of that county for trial, and the judge of the county court, being interested in the newspaper publishing the libel, has without objection referred the action, brought in the justice's court, to the Superior Court for trial, without himself trying the matter; *Held*, no bill of indictment is required, and objection to the jurisdiction of the Superior Court will not be sustained.

CRIMINAL ACTION, tried at the November Term, 1919, of PITT, before *Kerr, J.*, and a jury.

The action was commenced before C. D. Rountree, a justice of the peace, with the issuance of a warrant against the defendants, charging them with libelling Joseph McLawhorn, sheriff of Pitt County. Upon the preliminary hearing the magistrate found a case of probable cause against the defendants and they were bound over by him to the County Court of Pitt County. When the case was called for trial in the County Court, Hon. F. M. Wooten, the county judge, announced from the bench that he would not try the case for the reason that he was a stockholder in

defendant company, and thereupon, of his own motion, transferred the cause to the Superior Court of Pitt County for trial, where it was duly docketed, and for three regular terms of said court was continued by the presiding judge upon motion of defendants. The case came on for trial at the November Term, 1919, and without objections from defendants the trial proceeded upon the original warrant. Upon the evidence the defendants were found guilty by the jury, and adjudged by the court to pay a fine of $100 each, and the cost, from which judgment defendants appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Ward & Grimes, Small, MacLean, Bragaw & Rodman, S. J. Everett, and Julius Brown for defendants.

HOKE, J. On the hearing it was made to appear that in June, 1918, defendants had published an editorial comment as to the conduct of the prosecutor, Joseph McLawhorn, then sheriff of Pitt County, and a candidate for renomination at the approaching primaries, charging, in effect, that the prosecutor had been unfaithful and criminally negligent in the performance of his official duties in reference to enforcing the statutory provision applicable to deserters and slackers, under the Federal draft acts, and containing allegations that the recent killing of one of these deserters in the effort to arrest him was indirectly due to this misconduct on the part of the sheriff and the demoralized condition thereby created. There were also facts in evidence on the part of the State tending to show that these charges were false and permitting the inference that the publication was malicious. For the defendant there was evidence tending to show that the allegations were true, or that the publication was made under the fair and reasonable belief that they were true and so not malicious.

With this opposing testimony the court instructed the jury on the issue as follows: "If you find from the evidence in this case, beyond a reasonable doubt, that the defendant, the Greenville Publishing Company, published the alleged article by and with the procurement or consent of its managing editor, James L. Mayo, of and concerning the prosecuting witness, in which it stated words to the effect that he procured and counseled his son to remain out of service of the United States army after his desertion therefrom, or by advice aided and abetted him in doing the same, then this accusation charges him with a crime punishable by indictment, and is libelous *per se;* and the law presumes malice, and the defendants, both of them, nothing else appearing, would be guilty as charged in the warrant, and you should so find." And further: "When malice is

shown, or presumed by law, the burden then shifts to the defendant to show to the jury, not beyond a reasonable doubt, but to your satisfaction, if they can, that the publication was not a malicious publication, but that it was founded upon information which they reasonably believed to be true, amounting to probable cause for comment, and you are the judges of the reasonableness of the belief of the truth of the information. Mere color of lawful occasion and pretense of justification is not sufficient, but this belief must be founded upon reason, and you are the judges of the reasonableness of the same, or that the said statement of and concerning the prosecuting witness, was in fact not false but true, and if the defendants or either of them, have so satisfied you of both or either of these facts, then they would not be guilty and your verdict should be not guilty."

To these instructions defendants have duly excepted and assigned the same for error.

Recognizing that it is the public interest that the conduct and qualifications of officials and candidates for public office should be subjected to free and fair criticism, and discussion on the part of their constituents, it is held for law in this jurisdiction that such criticism presents a case of qualified privilege and in order to a conviction of libel by reason of a defamatory publication of this character it must be shown that it is both false and malicious and our decisions on the subject are to the effect further that the "falsity of the charge is not of itself sufficient to establish malice, there being a presumption that such a publication is made in good faith." True, the malice referred to is not necessarily that of personal ill will or malevolence; it may be said to exist when it is shown that the publication is made from some ulterior motive and it may be inferred where a defamatory statement is knowingly false or made without any fair or reasonable grounds to believe in its truth, or, at times, from the character and circumstances of the publication itself, but with the exception, probably, that a man's general moral character is presumed to be good until the contrary is shown, this being, as stated, a case of qualified privilege, the burden is on the State to show and, in a criminal prosecution, to show beyond a reasonable doubt, that the defamatory charge is both false and malicious. *Lewis v. Carr,* 178 N. C., 578; 101 S. E., 97; *Riley v. Stone,* 174 N. C., 588; *Osborn v. Leach,* 135 N. C., 628; *Ramsay v. Cheek,* 109 N. C., 270; 17 R. C. L., 417-418; title Libel and Slander, secs. 177-178.

Recurring to the portions of the charge objected to, we do not think the defendants have been given the benefit of the principle to which we have adverted. For, being of opinion that the defamatory article amounted to the accusation of a serious criminal offense, his Honor held, in effect, that the law would imply malice and placed on the defendants the burden

of repelling the imputation. In the case of *Lewis v. Carr, supra,* the article undoubtedly contained a charge of crime and yet, being a case of qualified privilege, the court ruled that the burden of showing malice remained upon the State. Again, we are of opinion that the evidence offered by defendants to the effect that "there was general complaint in the county at the time, of the negligence of the sheriff in the enforcement of the law as to deserters and slackers" should have been received. True, evidence of this kind is not ordinarily competent to show the truth of a defamatory charge, but it is relevant as tending to show good faith on the part of defendants, a county newspaper and its editor, in making the publication.

There is no merit in the objection made by defendants to the jurisdiction of the court. The statute establishing the Inferior Court of Pitt County, after declaring this and various other offenses, committed to its jurisdiction petty misdemeanors, provides that the same may be tried on the warrant of justices of the peace, acting as committing magistrates. In sec. 3 of the statute authority is conferred on the judge of said Inferior Court to transfer any and all causes to the Superior Court of Pitt County for trial. The procedure thus provided has been pursued in the present instance and in such case it is held that no bill of indictment is required. *State v. Hyman,* 164 N. C., 411; *State v. Lytle,* 138 N. C., 738.

For the errors indicated, however, the defendants are entitled to a new trial of the issue, and it is so ordered.

STATE v. SPAIN BAILEY, J. A. HALES, J. H. EVANS AND J. W. STANCIL.

(Filed 17 March, 1920.)

1. Appeal and Error—Jurors—Courts—Discretion.

The finding of the trial judge upon supporting evidence that a juror is indifferent is not reviewable on appeal.

2. Jurors— Expressed Opinion— Fair Trial— Qualification— Findings— Appeal and Error.

Where a juror states on his *voir dire* that he has formed and expressed an opinion that the prisoners on trial for homicide were guilty, but this opinion was based upon talking with his neighbors and reading the newspaper accounts, but that, notwithstanding, as a sworn juror he could hear the evidence and the charge of the court and render a fair and impartial verdict, the finding of the court that he was an impartial juror will not be disturbed on appeal.

3. Jurors—Challenge—Several Defendants—Rejection by One Defendant.

The right of a defendant is to challenge and reject a juror on sufficient grounds, and where several defendants are on trial for the same homi-

cide one of them may not complain that a juror he had accepted had been rejected by another defendant.

4. Witnesses— Cross Examination— Leading Questions— Courts Discretion—Criminal Law—Incriminating Evidence.

It is within the discretion of the court to permit the State, upon the trial of homicide to ask leading questions of an unwilling witness, as, in this case, where the witness had been indicted in another bill for the same offense, and the question asked was evidently to refresh the memory of the witness from the record of his voluntary testimony in *habeas corpus* proceedings in the case. without objection or appearance that the evidence tended to incriminate the witness.

5. Appeal and Error—Witnesses—Evidence—Harmless Error—Irrelevant Evidence.

A question asked a witness for the accused of a homicide, who had set up an alibi in defense. as to a statement the defendant had made that he had been confined to his bed under a physician's care, is an attempt to bring out a declaration in the prisoner's favor, and not prejudicial to him, if erroneous; and the evidence is irrelevant when not in corroboration of the prisoner's evidence.

6. Witness—Evidence—Character.

Where the prisoner on trial for a homicide takes the stand in his own behalf he puts his character in evidence, and it is subject to impeachment, and not restricted to matters brought out on the direct examination.

7. Appeal and Error—Harmless Error—Witness—Evidence—Conversation—Contradiction.

The admission of testimony to contradict the prisoner's witness as to his conversation with another, will not be held for reversible error when it does not appear to have prejudiced the accused on trial for a homicide.

8. Instructions—Special Requests—Appeal and Error.

It is not error for the judge not to have given requested instructions in their exact language when he has substantially given them in his own language.

9. Instructions—Evidence—Appeal and Error.

A request for special instruction containing statements or inference of fact that the jury alone is required to find, is properly refused.

10. Evidence—Interested Witness—Criminal Law—Accomplice—Credibility—Instructions.

An instruction in a criminal case that the jury should carefully and cautiously scrutinize the evidence of an interested witness, and if they should then believe the witness had told the truth to give his testimony just as much weight as that of a disinterested witness, is correct as to such witness, and a requested instruction that the jury must consider the testimony with the other evidence in the case, for it to have the same effect is improper, for such is not required when the jury believes the testimony of the accomplice alone.

11. Instructions—Correct as a Whole.

When the judge's charge construed as a whole, is correct, an apparent error contained in a portion thereof is not reversible.

12. Criminal Law—Homicide—Aiders and Abettors.

Upon a trial for a homicide, those present who were present aiding and abetting are guilty with the one who actually shot and killed the deceased.

13. Homicide—Criminal Law—Deadly Weapon—Burden of Proof.

Upon a trial for homicide, the burden is on the defendant to show matter in mitigation to the satisfaction of the jury, when the killing with a deadly weapon is proved or admitted.

APPEAL by prisoners from *Kerr, J.*, at Special June Term, 1919, of JOHNSTON.

They were tried at a Special Term of Johnston, 9 June, 1919, upon an indictment charging conspiracy to murder, and also the murder of, J. A. Wall, deputy sheriff of Johnston County. They were all convicted of murder in the second degree, and each was sentenced to 20 years in the State's Prison and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Pou, Wellons & Wellons, John E. Woodard, W. S. O'B. Robinson, W. A. Finch, Charles U. Harris, and W. E. Hooks for prisoners.

CLARK, C. J. The evidence for the State tended to show that the prisoners and three other men were operating an illicit distillery in Johnston County; that they had gone to the distillery fully armed, with the expressed determination to kill any officer who might interfere with them. The deceased, J. A. Wall, was one of a posse who went to the still and attempted to arrest the prisoners. In such an attempt he was killed by one of them, the State's evidence tending to show that the prisoner, Spain Bailey, was the man who actually committed the homicide, the weapon used being a shotgun. It is not contended that the evidence was not sufficient to justify the verdict.

Assignments of error 1 to 11 are to the judge overruling challenges for cause. In each case, after hearing the evidence, Judge Kerr held that the juror in question was indifferent. Such finding is not reviewable on appeal. *S. v. DeGraff*, 113 N. C., 688; *S. v. Register*, 133 N. C., 751, and the cases therein cited, and citations to those cases in the Anno. Ed.

W. F. Morris, on his *voir dire*, stated that he had formed and expressed the opinion that the prisoners were guilty, but that his opinion was based upon talking with the neighbors and reading the newspaper accounts. The court then asked him if he were chosen as a juror and sworn could he go into the jury box, hear the evidence and the charge of the court, and render a fair and impartial verdict. He replied that

he could. The court then held that he was an impartial juror. He was then challenged peremptorily, and the prisoners exhausted their challenges. The ruling of the court is sustained by the authorities. *S. v. Banner,* 149 N. C., 522; *S. v. Foster,* 172 N. C., 960; *S. v. Terry,* 173 N. C., 763, and cases there cited.

J. A. Morgan was asked the same questions and made the same reply, and the same was substantially the case as to A. B. Hollowell. J. W. Goodrich stated that he had formed and expressed the opinion that some of the seven in these indictments had killed Wall (there were 3 of them not on trial). He said: "My opinion is from what I have talked and read in the papers that some of that bunch killed him." He was then asked, as was asked Hollowell, above, "Notwithstanding the opinion which you may have formed and expressed that somebody is guilty, or some of these defendants is guilty of having shot the deceased, Wall, if you are chosen as a juror, etc., could you go into the jury box, hear the evidence and charge of the court, and render a fair and impartial verdict?" Upon his answering "Yes," the court found him indifferent and overruled the challenge for cause, and he was then challenged peremptorily. Substantially the same challenge and examination took place as to several other jurors when tendered, and upon the juror replying as above, that if sworn and accepted as a juror he could hear the evidence, and the charge of the court and would render a fair and impartial verdict, the court found the juror indifferent and thereupon overruled the challenge for cause, and the juror was challenged peremptorily except one or more, who, after the peremptory challenges were exhausted, was accepted and served on the jury. One juror, W. H. Etheridge was accepted by one of the prisoners, Hales, but on the peremptory challenge of one of the other prisoners, was rejected, and Hales excepted. There was no error in this, else not more than one defendant could be tried at a time. The right of a defendant is to challenge and reject (on sufficient ground), but not to select jurors.

The matters above set forth have been so fully discussed that there is no need of repeating what has been recently said in a very clear and forcible opinion by *Brown, J.,* in *S. v. Terry,* 173 N. C., 763.

In *S. v. Foster,* 172 N. C., 960, the printed record on file in this Court shows that the proposed juror had formed and expressed an opinion, and stated that it would take evidence to remove the impression. *Walker, J.,* in passing upon the exception to his reception as a juror, says: "The challenge to a juror, because he had formed and expressed an opinion, was fully met by the ruling of the court that he was fair and impartial. He stated that, notwithstanding the opinion he had formed, he could hear the case and render a verdict according to the law and the evidence. Three jurors on this occasion used that expression, but were peremptorily challenged and did not sit.

When a case is one of importance and has attracted much notice, there are few intelligent men in the county who have not heard the matter discussed, or have not read the accounts in the newspapers. But when the juror states that this is the source of his information, and that notwithstanding he can sit as a juror, and after hearing the evidence and the charge of the court he can render a fair and impartial verdict, and the court finds that this statement is true, and the juror indifferent, he is properly accepted. Otherwise, only the most ignorant, unintelligent, and uninformed men in the county would be competent as jurors. This would require every case to be removed that is of sufficient importance to be much talked about. Exception 12 is because Barden Pierce, who is indicted in another bill for this same offense, appearing to be an unwilling witness, the court, in the exercise of its discretion, permitted the counsel for the State to ask him if he had not testified in the *habeas corpus* hearing in this case, and upon his saying that he did, the court permitted him to be asked the question whether he had not replied that Jim Evans, John Stancil, and Spain Bailey were at Evans' store, to which he replied that he had.

This was simply permission to ask a leading question, which is entirely in the discretion of the court. The witness did not object that his reply would tend to incriminate himself, and it would not, for his examination in the *habeas corpus* proceeding was taken down, and it was not an impeaching question, and seems to have been asked for the purpose of refreshing the witness's memory as to his testimony voluntarily rendered at the former examination.

Exception 13 was to a question asked, on cross-examination for the prisoners, of Walter Stancil, with reference to an interview with Jim Evans, one of the prisoners who had set up an alibi that he was at home sick in bed at the time of the tragedy, and therefore could not have been at the still. He was asked as to some statement made to him by Evans, the object being to bring out a statement by Evans to the witness on that occasion that the doctor had been attending him, and that Evans said he had been confined to his bed for several days. This was an attempt to get out a declaration made by the prisoner in his own interest, and, besides, was irrelevant. It was not offered as corroboration of any testimony that prisoner had given on the stand, nor does it appear that the physician had been a witness in the cause. The evidence was properly excluded, *S. v. Hildreth*, 31 N. C., 440; *S. v. Howard*, 82 N. C., 623; *Ratliff v. Ratliff*, 131 N. C., 425.

Exceptions 14 and 15 are to questions to the prisoner Hales upon the stand under the cross-examination by the State to impeach his character. When the prisoner went upon the stand as a witness in his own behalf he put his character in evidence, and was subject to impeachment.

In *S. v. Cloninger,* 149 N. C., 572, the Court said: "The accused, by becoming a witness in his own behalf, is liable to cross-examination to impair his credit like any other witness, and the cross-examination is not restricted to matters brought out on the direct examination."

Exception 16. Harvey Stancil, witness for prisoners, had denied, on cross-examination, that he had had a certain conversation with Jarvis Edgerton. Harvey was placed on notice that it was proposed to contradict him. Edgerton was permitted to testify that Stancil went to him and had such conversation. This conversation may or may not have been irrelevant, as the prisoners contend, but there was nothing that tends to show that it was prejudicial.

The exceptions to the refusal of the judge to give special requests cannot be sustained. They were all substantially given in the charge, so far as they were correct, and it was not incumbent upon the judge to give them in the identical words of the prayer. The exception most pressed was the alleged failure to give the prayer set out in exception 22. This extended to a page and a half of printed record, and contains some statements or inferences of fact which it would have been improper for the judge to give, and therefore it was properly refused. Besides, if the prisoners could have selected out of this long prayer the sentence they rely upon, which is as follows: "The laws of this State impose upon you the duty to be careful about accepting the testimony of an accomplice in crime, and unless it, with the other evidence in the case, satisfies you beyond a reasonable doubt of the defendant's guilt, you should find the defendants not guilty," the exception could not be sustained for two other reasons, because the judge did substantially charge it, when he instructed the jury, that while they should "carefully and cautiously scrutinize the evidence of an interested witness, still if, after doing so, the jury should believe such witness told the truth about the matter that they should give his testimony just as much weight as they would that of a disinterested witness." *S. v. Boynton,* 155 N. C., 464, and cases there cited, and, besides, the judge was not required to so charge for "The unsupported testimony of an accomplice, if it produces entire conviction of the prisoner's guilt, is sufficient to warrant conviction." *S. v. Haney,* 19 N. C., 396; *S. v. Jones,* 176 N. C., 703; *S. v. Palmer,* 178 N. C., 822.

The exceptions to the charge as given are all to his statement of the contentions of the prosecution, and there is nothing to show that they were incorrect, and the defendant did not at the time ask any corrections therein.

Exception 30 is to a single paragraph taken out of the judge's instruction on the doctrine of reasonable doubt, but the whole instruction from which this is an excerpt is correct and full. Exception 31 is

because the judge charged: "If you find that one of the defendants did the shooting which killed, and that the others, or any one of them, were present, aiding and abetting, then those who aided and abetted would be guilty."

Exception 32 is because the judge, in full and appropriate language, laid down the established principle as applicable to this case, that if the killing with a deadly weapon is proved or admitted, the burden shifts to the defendant to show matter in mitigation to the satisfaction of the jury.

The charge is a full, fair, and careful presentation of the law applicable, and we find in his conduct of the trial

No error.

STATE v. LOUISE WALKER.

(Filed 17 March, 1920.)

1. Criminal Law—Warrants—Amendments—Vagrancy—Suppression of Prostitution—Statutes—Sentence—Judgments.

The punishment under the act for the suppression of prosecution, ch. 215, Laws of 1919, exceeds an imprisonment of thirty days or a fine of fifty dollars, and where a prosecution is heard in the Superior Court on a warrant issued by the mayor of a town, and not on appeal from the recorder's court, nor upon indictment found by a grand jury, and an amendment has been allowed in the language of Rev., sec. 3740 (7) defining vagrancy, and limiting the punishment to a fine of fifty dollars or imprisonment for thirty days, a sentence upon conviction, for twelve months cannot be sustained.

2. Criminal Law—Warrants—Second Offense.

Where the statute imposes a greater punishment for a second criminal offense, the first offense must be charged in the warrant, being a portion of the discription of the offense charged, for the imposition of the greater sentence.

3. Criminal Law—Warrants—Amendments—Reduced to Writing—Courts Discretion—Orders, Self Executing.

Where a warrant in a criminal action charges the defendant with "being a vagrant," it is within the discretion of the Superior Court judge to allow an amendment specifying the particular act under which it has been issued, in this case, Rev., sec. 3740 (7); and while it is the better practice to reduce the amendment to writing at the time, the order is self executing, and failure to do so does not destroy its legal effect.

4. Appeal and Error—Criminal Law—Sentence—Judgment—Statutes—Case Remanded.

Where a conviction for vagrancy has been legally had under Rev., sec. 3740 (7), and the sentence has been imposed of imprisonment for twelve

months allowed under the Act to Suppress Prostitution, ch. 215, Laws of 1919, the case will be remanded for the imposition of the proper sentence.

APPEAL by defendant from *Daniels, J.*, at the December Term, 1919, of LENOIR.

The defendant was convicted before the mayor of Kinston on a warrant charging that she "did unlawfully and wilfully violate a law of the State of North Carolina, No. ....., sec. ....., by being a vagrant," and appealed to the Superior Court, where she was again convicted.

After verdict, the defendant moved in arrest of judgment, and the solicitor for the State asked to be allowed to amend the warrant. The motion to amend was allowed, but the amendment, which added to the warrant, subsec. 7 of sec. 3740 of the Revisal, defining vagrancy, was not reduced to writing until after the term of court expired. The defendant excepted.

The motion in arrest of judgment was overruled, and defendant excepted.

His Honor then sentenced the defendant to twelve months in jail, finding in the judgment that this was a second conviction for the same offense, and the defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Joe Dawson for defendant.

ALLEN, J. The sentence of imprisonment for twelve months cannot be sustained under ch. 215, Laws of 1919, an act passed for the repression of prostitution, because the punishment for all the offenses condemned in that act exceeds imprisonment for thirty days, or a fine of $50, and this prosecution was heard in the Superior Court on a warrant issued by the mayor, and not on appeal from the recorder's court, nor was any indictment found by a grand jury.

It is also clear from the amendment allowed that the court was not proceeding under the act of 1919, as it is in the language of sec. 3740, subsec. 7, of the Revisal, which defines vagrancy, and limits the punishment to a fine of $50 or imprisonment for thirty days.

Nor can the judgment be approved on the ground that this is a second conviction for the same offense, because the first conviction is not alleged in the warrant. This was the precise question decided in *S. v. Davidson,* 124 N. C., 839, and it is in accord with the authorities elsewhere.

"Where, in case of repeated convictions for similar offenses, the statute imposes an additional penalty, an indictment for a subsequent offense must allege the prior convictions, since such convictions, although

they merely affect the punishment, are regarded as a portion of the description of the offense." 22 Cyc., 356.

The judgment must therefore be set aside, and the question remaining for decision is whether the warrant is sufficient to sustain any judgment.

It charged vagrancy before amendment, which seemingly is as specific and definite as the warrant, which was held to be valid in *S. v. Moore,* 166 N. C., 284, but, however this may be, the court, exercising its discretion, allowed an amendment, which it had the power to do (*S. v. Cauble,* 70 N. C., 64), and the amendment points to the subsection of the act defining vagrancy, which the defendant is alleged to have violated, which is sufficient in a warrant, with which the courts deal more liberally than with indictments.

The fact that the amendment was not reduced to writing at the time it was allowed does not destroy its legal effect, but it is the better practice to require this to be done.

In *S. v. Yellowday,* 152 N. C., 793, there was a motion in arrest of judgment by the defendant, and one to amend by the State, as in this case, and the amendment allowed, a material one, and it was held that the order of amendment was self-executing, although the amendment was not reduced to writing.

The Court says: "It appears from the record that the court ordered an amendment of the warrant, by the insertion therein of the words, 'without a license so to do,' but the words were not actually inserted in the complaint or the warrant by the solicitor. The order of the court, as has been decided by this Court several times, was self-executing. In the case of *Holland v. Crow,* 34 N. C., 280, *Chief Justice Ruffin,* for the Court, says: 'The variance between the relators in the petition and the *scire facias* is cured by the order for amendment. It is true, the amendment was not actually made. But the *scire facias* was issued upon the assumption of the amendment, and all the subsequent proceedings were based upon the supposition that one was as properly a relator as the other, and in such cases the course is to consider the order as standing for the amendment itself.' He cited the case of *Ufford v. Lucas,* 9 N. C., 214, in which it is held, as it was in the case just cited, that where, during the pendency of the suit, leave is obtained to amend the writ and change the form of action, if such amendment be not made on the record, and the suit be tried in its amended form or as if the amendment had been actually made, this Court will consider the case as if the amendment had been properly inserted in the writ, warrant, or complaint at the time the order was made by the court. This is a most just and reasonable rule, and is essential to the due administration of the law."

In this case no objection was made at the time to proceeding as if the amendment had been drawn out, nor is there any claim that the

amendment appearing in the record is not the one ordered by the court.

We are therefore of opinion that judgment may be pronounced on the warrant as amended, and following the precedent in *S. v. Taylor,* 124 N. C., 803, and in other cases the cause is remanded in order that judgment may be entered upon the verdict under the Vagrancy Act.

Remanded.

STATE v. ROBERT HICKS.

(Filed 10 March, 1920.)

1. Intoxicating Liquors—Spirituous Liquors—Unlawful Sale—Statutes—Exceptions—Indictment—Defense.

An indictment for the unlawful sale of spirituous liquor, Laws 1913, ch. 44, sec. 6, is sufficient which charges the unlawful and willful sale thereof, without naming the person to whom sold, or negativing the conditions under which it may lawfully be sold; such as that it was not domestic wines or sold in more than two and one-half gallons, or in unsealed packages, etc., the protective provisions of the statute (sec. 1) being matters of defense.

2. Intoxicating Liquors—Spirituous Liquor—Time not of Essence—Place of Sale—Pleas—Abatement.

The time of offense of selling intoxicating liquors, contrary to the statute, is not of its essence and failure to allege that the sale took place in the county, may only be taken by plea in abatement.

3. Intoxicating Liquors—Spirituous Liquors—Unlawful Sales—Evidence—Nonsuit—Trials.

Judgment as of nonsuit upon the evidence cannot be taken in an action for the unlawful sale of domestic wine, on the premises, etc., under Laws of 1913, ch. 44, permitting the sale of quantities of less than two and one-half gallons in sealed packages, etc., when there is evidence that the witnesses bought two gallons of the liquor from the defendant, which the latter poured into the witness's jug, which the latter carried away unsealed, the burden being on the defendant to show the wine was of his own manufacture, sealed or crated, etc., and other matters of a lawful sale which are an exception by the statute to its other provisions.

APPEAL by defendant from *Daniels, J.,* at October Term, 1919, of SAMPSON.

The defendant was indicted on a charge that he did "willfully and unlawfully sell, or dispose of for gain, to Mat Watson and other persons to the jurors unknown, in quantities less than 2½ gallons, certain spirituous, vinous, or malt liquors, or a certain mixture containing alcohol or cocaine, or morphine, or other opium derivative." Verdict of guilty, and judgment. Appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Kerr & Herring, Fowler & Crumpler, and Butler & Herring for defendant.

CLARK, C. J. An indictment is sufficient which simply charges the unlawful and willful sale of vinous liquors without naming the person to whom sold. Laws 1913, ch. 44, sec. 6; *S. v. Brown,* 170 N. C., 714, or without negativing the conditions under which it may be lawfully sold, *S. v. Moore,* 166 N. C., 284. The indictment in this case, therefore, omitting surplusage, charges the offense of the unlawful sale of wine. The proviso, in sec. 3, ch. 35, Laws 1911—"this act shall not apply to the sale of domestic wines when sold in a quantity of not less than 2½ gallons, in *sealed* packages or crated, on the premises where manufactured," is a matter of defense, which need not be set out in the indictment, and must be shown in proof by the defendant as a matter of defense. *S. v. Wainscott,* 169 N. C., 379, citing *S. v. Moore, supra,* where the matter is fully discussed; *S. v. Hicks,* 174 N. C., 802.

The indictment charges that the sale was in Sampson County, and that it was made in August, 1919, but time was not of the essence of the offense, *S. v. Jones,* 80 N. C., 415, and if it had not appeared that the sale took place in Sampson objection could only be taken by plea in abatement. *S. v. Holder,* 133 N. C., 709, both cases cited in *S. v. Burton,* 138 N. C., 576, which quotes many authorities and states that they are uniform.

Leon Pigford testified: "Some time in September, 1919, I went to the defendant's house and paid him at the rate of four dollars per gallon for what he called wine. He measured out two gallons and put it in my jug, and then he put something else in there amounting to about a half gallon, and I don't know what this was. He then stopped the jug up and handed it to me, and I carried it away from his house, and the jug was not sealed or crated. He stated that he did not open or drink any of the contents of the jug on defendant's premises. That he really did not know what the stuff was. That he saw some vessels while at defendant's house, that were stained and appeared to witness as though blackberries or dewberries had been mashed in these vessels."

The defendant introduced no evidence. There was no evidence that the wine was of the defendant's own manufacture, which it was incumbent upon the defendant to prove. The uncontradicted testimony was that the jug "was not sealed or crated." The judge, therefore, properly refused to give judgment of nonsuit.

No error.

STATE v. LONNIE BURNETT AND ERNEST BURNETT.

(Filed 31 March, 1920.)

1. Courts—Juvenile Courts—Delinquent Children—Guardian and Ward—Constitutional Law.

Chapter 97, Laws of 1919, entitled "An act to establish Juvenile Courts" is designed and intended to take over in behalf of the State, the guardianship of delinquent and dependent children under sixteen years of age, specified and described in the statute where it is clearly established that the care and control of the parents or others having present charge of such children is inadequate and harmful, and the welfare of the child and the best interest of the State clearly requires it, and the same is held to be a constitutional and valid enactment.

2. Same—Statutes—Interpretation.

Under said statute and in case of children under the age of sixteen years charged with being delinquent by reason of the violation of the criminal laws of the State, the act provides and intends to provide in effect:

(a.) That children under fourteen years of age are no longer indictable as criminals, but must be dealt with as wards of the State, to be cared for, controlled and disciplined with a view to their reformation.

(b.) That in case of children between fourteen and sixteen years of age, and as to felonies, whenever the punishment cannot exceed ten years, they may if the instance requires it, be bound over to the Superior Court to be prosecuted under the criminal law appertaining to the charge.

(c.) That in case of children from fourteen to sixteen years of age and as to felonies, whenever the punishment is ten years and over they are amenable to prosecution for crime as in case of adults.

3. Courts—Juvenile Courts—Jurisdiction—Statutes.

The exception in our statute creating the juvenile court, ch. 97, Laws of 1919, that a case may not be investigated on the petition of the parent, etc., when the custody of the child is committed to an institution controlled by the State, applies to the action of the juvenile court, and does not limit the Superior Court in its general jurisdiction over matters of law and equity, in making, upon proper application and appropriate writs, inquiry and investigation into the status and condition of children disposed of under the statute, or in rendering such orders and decrees therein as the rights and justice of the case or the welfare of the child may require.

4. Courts—Juvenile Courts—Crimes—Constitutional Law—Statutes.

Our constitution established the only punishment for crimes recognized by the law of this State, and states, Art. II, sec. 2, that the object of punishment is not only to satisfy justice but to reform the offender and thus prevent murder, arson, burglary and rape, and those punishable with death if the General Assembly shall so enact, and the 4th section of the Bill of Rights admonishes against cruel and unusual punishment, and it is within the discretionary authority of the Legislature, with these limitations, to pass upon, by proper enactment, the question of crime and its punishment.

5. Same—Common Law—Wayward Children.

Our Constitution, in conferring legislative authority upon the General Assembly, included the legislative powers of the English Parliament or of other governments of a free people, except such as restrained by express constitutional provision or necessary implication therefrom, and there being no constitutional inhibition, either state or federal, and delinquent, dependent, and wayward children being regarded in a peculiar sense as within the care and wardship of our State, the powers conferred by our legislature, ch. 97, Laws of 1919, creating a juvenile court, are constitutional and valid.

6. Same—Trial by Jury.

Ch. 97, Laws of 1919, creating a juvenile court, etc., does not deal with delinquent children as criminals, but as wards of the State, and undertakes to give them the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, and a support and not a hindrance to the commonwealth, and the objection that the statute ignores or unlawfully withholds the right to a trial by jury, cannot be sustained.

7. Courts—Juvenile Courts—Parent and Child—Jurisdiction.

Parents, guardians, etc., must be notified and given an oportunity to be heard in proceeding in the juvenile courts under ch. 97, Laws of 1919, with the right to review in the Superior Court upon adverse judgment: and if the child is taken over by the State, they are allowed, on proper application at any time, to have their child brought before the Court, its condition inquired into and further orders made concerning it except where committed to a State institution and then they may apply directly to the Superior Court, thus giving full consideration to the family relation and parental rights.

8. Courts—Juvenile Courts—Parent and Child—Custody of Child.

The right of parents to the care and custody of their children is not absolute and universal and may be made to yield when it is clearly established under the provisions of the act to create juvenile courts, ch. 97, Laws of 1919, that the welfare of the child requires it.

9. Courts—Juvenile Courts—Crimes and Punishments—Felonies—Capital Offense—Criminal Law.

The act establishing a juvenile court, ch. 97, Laws of 1919, only operates to extend the conclusive presumption of the age, existing at common law, at which a child is not capable of committing crime, and thereunder a child of ten years of age may not be convicted of committing a capital offense.

10. Courts—Juvenile Courts—Statutes—Repealing Statutes.

Ch. 97, Laws of 1919, establishing a juvenile court, repeals ch. 122, Laws of 1915, and *S. v. Newell*, 172 N. C., p. 933, has no application.

INDICTMENT for murder heard on motion by defendants to quash the Bill before his Honor, *W. M. Bond, Judge,* at November Term, 1919, Superior Court Bertie County.

The bill of indictment, charging defendants in formal terms with the murder of Ludelle Hyman, deceased, contained on its face the averment that both of defendants were under 10 years of age, and it being admitted on the hearing that said defendants were under the age of ten, the court gave judgment that the Bill be quashed and defendants remanded to the Juvenile Court to be dealt with pursuant to law, being of opinion that, under the act of the General Assembly, establishing said courts, children of that age are exempt from prosecution as criminals.

The State, having duly excepted, appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel for defendant.

HOKE, J. The General Assembly of 1919, passed an act entitled "An act to create Juvenile Courts in North Carolina," ch. 97, Laws 1919, designed and intended in behalf of the State to take over the guardianship of delinquent and dependent children under the age of 16 years when they come within the descriptive specifications of the law and it is established that the care and control of the parents, or others having present charge of such children, is inadequate and harmful and that the welfare of the child and the best interest of the State clearly require it. With this end in view, the statute, in sec. 1, makes provision as follows:

"Section 1. The Superior Court shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at this time within their respective districts—

"(a) Who is delinquent or who violates any municipal or State law or ordinance or who is truant, unruly, wayward, or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so; or

"(b) Who is neglected or engages in any occupation, calling, or exhibition, or is found in any place where a child is forbidden by law to be, and for permitting which an adult may be punished by law, or who is in such condition or surroundings or is under such improper or insufficient guardianship or control as to endanger the morals, health, or general welfare of such child; or

"(c) Who is dependent upon public support, or who is destitute, homeless, or abandoned, or whose custody is subject to controversy.

"When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purposes of this act during the minority of the

child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child, and to the best interests of the State."

In sec. 2, and for the administration of the law in its principal features, juvenile courts, as a separate part of the Superior Court, are established in all the counties of the State, the office of judge of such court to be filled by the clerk of the Superior Court of their respective counties, and, in later sections, special provision is made for establishment of juvenile courts in cities of 10,000 inhabitants or more, and also in cities of 5,000, this last being in the discretion of the governing body of the town, and where they are not county sites and have a recorder's court. In sec. 4 it is required that a full and complete record be kept of proceedings in each and every case, and this requirement and the effect of such proceedings and adjudications therein on the status of the child in reference to criminality as well as the general purpose of the law, and the spirit in which it is to be administered are set forth as follows:

"The court shall maintain a full and complete record of all cases brought before it, to be known as the Juvenile Record. All records may be withheld from indiscriminate public inspection in the discretion of the judge of the Court, but such record shall be open to inspection by the parents, guardians, or other authoritative representatives of the child concerned. No adjudications under the provisions of this act shall operate as a disqualification of any child of any public office, and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction.

"This act shall be construed liberally and as remedial in character. The powers hereby conferred are intended to be general and for the purpose of affecting the beneficial purposes herein set forth. It is the intention of this act that in all proceedings under its provisions the court shall proceed upon the theory that a child under its jurisdiction is the ward of the State, and is subject to the discipline and entitled to the protection which the court should give such child under the circumstances disclosed in the case."

Sec. 5 and three subsequent sections contain general regulations as to procedure and requiring notices to parents or guardians or others having present control of the child under investigation, and in sec. 9, the course and scope of the inquiry at the hearing and the disposition that may be made of cases under investigation, are stated as follows:

"SEC. 9. Upon the return of the summons or other process or after any child has been taken into custody, at the time set for the hearing the court shall proceed to hear and determine the case in a summary

manner. The court may adjourn the hearing from time to time and inquire into the habits, surroundings, conditions, and tendencies of the child so as to enable the court to render such order or judgment as shall best conserve the welfare of the child and carry out the objects of this act. In all cases the nature of the proceedings shall be explained to the child, and to the parents or guardian or person having the custody or the supervision of the child. At any stage of the case the court may, in its discretion, appoint any suitable person to be the guardian *ad litem* of the child for the purposes of the proceeding. The court, if satisfied that the child is in need of the care, protection, or discipline of the State, may so adjudicate, and may find the child to be delinquent, neglected, or in need of more suitable guardianship. Thereupon the court may:

"(a) Place the child on probation, subject to the conditions provided hereinafter; or

"(b) Commit the child to the custody of a relative or other fit person of good moral character, subject, in the discretion of the court, to the supervision of a probation officer, and the further orders of the court; or

"(c) Commit the child to the custody of the State Board of Charities and Public Welfare, to be placed by such board in a suitable family home and supervise therein; or

"(d) Commit the child to a suitable institution maintained by the State or any subdivision thereof, or to any suitable private institution, society, or association incorporated under the laws of the State and approved by the State Board of Charities and Public Welfare authorized to care for children or to place them in suitable family homes; or

"(e) Render such further judgment or make such further order of commitment as the court may be authorized by law to make in any given case.

"(f) If a child of fourteen years of age be charged with a felony for which the punishment as now fixed by law cannot be more than ten years in prison, his case shall be investigated by the probation officer, and the judge of the juvenile court, as provided for in this act, unless it appears to the judge of the juvenile court that the case should be brought to the attention of the judge of the Superior Court, in which case the child should be held in custody or bound to the next term of the Superior Court as now provided by law."

In sec. 10 reference is again made to the disposition of the child in reference to its treatment, and it is enacted, among other things, "That no child coming within the provisions of this act shall be placed in any penal institution, jail, lock-up, or other place where such child can come into contact at any time or in any manner with any adult convicted of crime, and committed or under arrest and charged with crime."

Ample provision is made also for care and supervision of the child pending its wardship by the court, through its designated officers, and further: "When a child has been committed to the custody of an institution not controlled by the State, or to any association, society, or person, on petition of the parent, guardian, or next friend of the child, the case may be investigated and such further orders and decrees made therein as the 'good of the child and circumstances of the case may require.'"

It may be well to note that the exceptions appearing here as to children committed to a State institution refers only to the action of the juvenile court in the premises, and for the reason, doubtless, that it was not considered feasible that the rules and discipline of a public institution of that character should be liable to obstruction or interference by any one of the 100 or more juvenile courts existent throughout the State. But the exemptions referred to creates no limitations on the jurisdiction of the Superior Court in these cases which, under the first sections of the act and by virtue of its powers, as a court of general jurisdiction administering both law and equity, may always, on proper application and appropriate writs, make inquiry and investigations into the status and conditions of children disposed of under the statute, and make such orders and decrees therein as the right and justice of the case may require. And in sec. 20 it is provided that an appeal lies from any judgment of the juvenile court to the Superior Court, at the instance of the child's parents, or, if none, by the guardian, custodian or next friend of the child, where this disposition made of the child can be reviewed by the judge, and such orders made therein as may be in accordance with law and the course and practice of the court.

On this, a sufficient statement of the terms of the statute for a proper apprehension of the question presented, we are of opinion, and so hold, that the prosecution of these infant children, both under 10 years of age at the time of the alleged offense, cannot now be maintained. Recurring to the portions of the law more directly relevant to the inquiry, it appears that original and exclusive jurisdiction of all cases of delinquent and dependent children, as defined and specified in the act, is vested in the Superior Courts; that in causes investigated and determined by the juvenile court, constituted for such purpose a part of the Superior Court, no adjudication of such court shall operate to disqualify the child for public office nor shall it be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction, and further, that no child dealt with under the provisions of the act shall be placed in any penal institution or other place where they may come in contact, at any time or manner, with adults convicted of crime or charged with it. And, in reference to the disposition of children

charged as delinquents by reason of having violated a State or municipal law, and that alone, it is provided in sec. 9 that a child of 14 years, charged with a felony in which the punishment, as now fixed by law, cannot exceed 10 years, the judge of the juvenile court may, if the case be of a nature to require it, bind such child over to the next term of the Superior Court, it being the clear and necessary inference that, as to children of 14 and upwards, and in case of felonies when the punishment may exceed 10 years, the juvenile department of the Superior Court is without jurisdiction of the offense. And from these provisions we conclude, as ruled by his Honor in the court below, that children under 14 years of age are no longer indictable as criminals, but are, in the cases specified, committed for reformation and primarily to the juvenile department of the Superior Court.

2. That children 14 years and over to 16, and in case of felonies, in which the punishment cannot exceed the period of 10 years, are committed to the investigation of the juvenile court, and may be bound over to be proceeded against under the criminal law appertaining to the case.

3. As to children of 14 years and over, and in case of felonies in which the punishment may be more than 10 years, they shall, in all instances, be subject to prosecution for crime as in case of adults.

It is the accepted position in this State that our Constitution in vesting the General Assembly with legislative authority, conferred and intended to confer upon that body all the "legislative powers of the English Parliament or other government of a free people," except where restrained by express constitutional provision or necessary implication therefrom. *Thomas v. Sanderlin,* 173 N. C., 329-332; *S. v. Lewis,* 142 N. C., 626; Black Constitutional Law (3 ed.), sec. 351, erroneously printed in *Thomas' case* as sec. 357. Considered in view of this principle, we find nothing in our Constitutions, State or Federal, which inhibits legislation of this character. Art. XI, after establishing the only punishments for crime that may be recognized by the laws of the State, in section 2, provides, "That the object of punishment being not only to satisfy justice, but to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only shall be punished with death if the General Assembly shall so enact," and sec. 4 of the Bill of Rights contains admonitions against "cruel and unusual punishments," both restrictive of the severity of punishment, and, with these limitations, the question of crime, and its punishment and whether to impose or withdraw it is referred entirely to the legislative will. And the act concerning delinquent, dependent, and wayward children, who have always been regarded in a peculiar sense as within the care and wardship of the State, comes well within the right of classification

referred so largely by State and Federal law to the legislative discretion. *Smith v. Wilkins,* 164 N. C., 136; *Morris v. Ex. Co.,* 146 N. C., 167; *Efland v. R. R.,* 146 N. C., 135; *S. v. Heitman* (Kan.), 181 Pac., 630.

Statutes of this kind have been very generally upheld in the authoritative cases on the subject, and our own Court has already expressed its approval of the general principles upon which they are made to rest. *In re Watson,* 157 N. C., 340; *Van Walters v. Board and Guardian,* 132 Ind., 567; *Mill v. Brown,* 31 Utah, 473; *Lindsay v. Lindsay,* 257 Ill., 328; *Pugh v. Bowden,* 54 Fla., 302; *Hunt v. Wayne Co. Cir. Judges,* 142 Mich., 93; *Commonwealth v. Fisher,* 213 Pa. St., 48; *State, ex re, v. Marmorget,* 111 La., 226; *Prescott v. State,* 19 Ohio St., 184; *Ex parte Januszewski,* 196 Fed., 123.

To the objections frequently raised that these statutes ignore or unlawfully withhold the right to trial by jury, these and other authorities well make answer that such legislation deals and purports to deal with delinquent children not as criminals, but as wards and undertakes rather to give them the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, a support and not a hindrance to the commonwealth. Speaking to this aspect of the matter in *Watson's case, Associate Justice Allen,* delivering the opinion, said: "The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the declaration of rights, nor is it a punishment for crime."

And in *Ex parte Januszewski, supra, Sater, J.,* speaking to a similar statute, said: "The purpose of the statute is to save minors under the age of 17 years from prosecution and conviction on charges of misdemeanors and crimes, and to relieve them from the consequent stigma attaching thereto; to guard and protect them against themselves and evil-minded persons surrounding them; to protect and train them physically, mentally, and morally. It seeks to benefit not only the child, but the community also, by surrounding the child with better and more elevating influences and training it in all that counts for good citizenship and usefulness as a member of society. Under it, the State, which, through its appropriate organs, is the guardian of the children within

its borders (*Van Walters v. Board,* 132 Ind., 569; 32 N. E., 568; 18 L. R. A., 431), assumes the custody of the child, imposes wholesome restraints, and performs parental duties, and at a time when the child is not entitled to either by the laws of nature or of the State, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it owes obedience and subjection." . . . And further: "The welfare of society requires and justifies such enactments. The statute is neither criminal or penal in its nature, but an administrative police regulation." And a perusal of this statute will disclose that the rights of parents have been throughout most carefully conserved.

In any proceedings under the law, they must be notified and given an opportunity to appear and be heard. If the judgment of the juvenile court is against them, they may appeal and have such judgment reviewed by the judge of the Superior Court. And if the guardianship of the child is taken over by the State, they are allowed, on proper application, at any time, to have their child brought before the court, its condition inquired into, and further orders made concerning it except, as shown, when committed to a State institution, and then they may apply directly to the Superior Court. And in any sane and just administration of this measure, the family relationship and this parental right, which are at the very basis of our social order, and among its chiefest bulwarks, must always be given full consideration.

Speaking to this question in 20 R. C. L., pp. 601-602, quoted with approval in *Means case,* 176 N. C., 311, the author says: "The natural affection of parents is ordinarily the best assurance of the child's welfare, and the object to be sought for the child is not so much the luxury and social advantages, which more wealthy guardians might be able to give it, as the wholesome intellectual and moral atmosphere likely to be found in its natural home." But this right and relationship, important as it is, is not absolute and universal, and may be made to yield when it is established that the welfare of the child and the good of the community clearly requires it. This has been held with us in numerous decisions concerning the disposition of children under the general principles of the common law and equity prevailing in this State. *In re Warren,* 178 N. C., 43; *In re Means,* 176 N. C., 307; *Atkinson v. Downing,* 175 N. C., 244; *In re Mercer Fain,* 172 N. C., 790. And, undoubtedly, it may be so provided by an act of the Legislature in the well ordered exercise of the police power. At common law, there is a conclusive presumption that a child under 7 years of age is incapable of committing crime, and the same presumption exists to the age of 14, as to minor offenses. *S. v. Pugh,* 52 N. C., 61. Between 7 and 14, and as to graver crimes, there was also a presumption against the ability to com-

mit them, rebuttable, however, on clear and convincing proof that the child possessed the knowledge and discretion requisite for legal accountability. The statute in this respect only operates to extend the conclusive presumption, in all cases, to children under 14, and as we have endeavored to show, is clearly within the legislative powers.

It may have been better that, as to the higher crimes of murder, arson and the like, the principles of the common law should continue to prevail, but, as suggested by an able, ardent advocate of the measure, and a firm believer in it, there could not well be conceived, in this day and time, a case where the enlightened public sentiment of the State would approve the capital execution of a child under 14, and, if this be true and it comes to a question as to whether a child of that immature age should be degraded and punished as a criminal or restrained and disciplined with a view to its reformation, the advocates of the latter course would seem to have the better of the argument. These considerations, however, are entirely for the Legislature, and that body having passed a valid statute, exempting children under 14 from prosecution for crime, it is ours only to observe its requirements and interpret it according to its true intent and meaning. The case of *S. v. Newell,* 172 N. C., 933, to which we were cited, was on a law having substantially different provisions, to wit, Laws 1915, ch. 122, and which is expressly repealed by the present statute.

There is no error, and the judgment of the Superior Court is

Affirmed.

STATE v. FRED SHOAF.

(Filed 7 April, 1920.)

1. Sunday—Hotels—Restaurants—Cafes—Statutes.

Under a statute, local to a county, prohibiting shops, stores, etc., from being kept open on Sunday for the sale of any goods, wares or merchandise within four miles of any incorporated city or town within the county, providing that the act shall not apply to hotels or boarding houses, or restaurants or cafes furnishing meals to actual guests, when not otherwise prohibited by law from being kept open on Sunday, *Held*, the words "restaurants or cafes" are substantially synonymous, and a place where stools and counters only were used for the service to customers of lunches, "weiners" and egg sandwiches, comes within the definition of the exception; and the sale of these not being unlawful, the fact that the place was called a "weiner joint" does not render it so.

2. Same—Evidence—Nonsuit—Trials.

A "weiner" is a small sausage of unknown contents, commonly called a "hot dog," and to a great many people is a palatable and appetising

article of food, and though a "joint" is regarded as a place usually kept for unlawful meetings, the term "weiner joint" does not render a "restaurant or cafe," so denominated in the evidence, an unlawful place, where all of the evidence shows that it was conducted properly and in an orderly manner for furnishing lunches, etc., to its customers, and where a statute excepts "restaurants and cafes," etc., from the operation of its provision prohibiting keeping stores, etc., open on Sunday, it is error for the judge to refuse defendant's motion to nonsuit upon the evidence which should have been granted and is equivalent to a verdict of not guilty. Gregory's Supplement, sec 3265a.

INDICTMENT, tried before *Ray, J.*, and a jury, at January Term, 1920, of FORSYTH.

Defendant was charged with the offense of "unlawfully and wilfully exposing for sale his goods and keeping open his place of business on Sunday" in violation of Public-Local Laws of 1919, ch. 320, which reads as follows, omitting immaterial parts thereof: "No person, firm, or corporation in Forsyth County shall expose for sale, sell, or offer for sale on Sunday any goods, wares, or merchandise within four miles of the corporate limits of any incorporated town or city, and no shop, store, or other place of business in which goods, wares, or merchandise of any kind are kept for sale shall keep open doors from 12 o'clock Saturday night until 12 o'clock Sunday night: Provided, that this act shall not be construed to apply to hotels or boarding-houses, or to restaurants or cafes furnishing meals to actual guests, where the same are not otherwise prohibited by law from keeping open on Sunday."

The only witness was E. E. Wooten, who testified: "I know Fred Shoaf, the defendant. He runs what is called a 'weiner joint' at Hanestown, a village about three miles west of Winston-Salem. I have seen defendant selling lunches, weiners, and egg sandwiches on Friday night, Saturdays, and Sundays. I did not take the names of the people who bought from him. I saw him selling these things on two different Sundays within the last six months at Hanestown, in Forsyth County. He had no tables in his place, but had a counter with stools along in front of it, and his customers occupied those stools while eating."

The place at which defendant sold these meals, or lunches, was within two miles of the corporate limits of Winston-Salem. At the close of the evidence the defendant moved for judgment of nonsuit—motion denied, and he excepted. He was convicted, and appealed from the judgment.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. T. Wilson and J. B. Craver for defendant.

WALKER, J., after stating the case as above: The facts in this case bring it directly within the purview of the exemption and not within the prohibition of the statute, being excepted from it by the proviso.

The term "restaurant and cafe," in common parlance, and, we think, as used in the statute, are substantially synonymous. A restaurant is generally understood to be a place where refreshments, food and drink are served. Whether they are served to guests seated at a table or on stools at a counter does not affect the definition, that being merely a detail in the operation of the restaurant. The evidence shows that the defendant had no tables in his place, but had a counter with stools ranged along in front of it, and to the guests seated on these stools he sold lunches, weiners, and egg sandwiches. This, it seems to us, was strictly a restaurant business within the approved definition as shown in the dictionaries and in 7 Words and Phrases, p. 6180. While the word "restaurant" has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating-house and cook-shop, to any other place where eatables are furnished to be consumed on the premises. *Richards v. W. Fire and M. Ins. Co.*, 60 Mich., 420; *Lewis v. Hitchcock*, 10 Fed., 4. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat. *People v. Jones*, 54 Barb., 311, 317, and a restaurant keeper as a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the taste of his patrons. *In re Ah Yow*, 59 Fed., 561, 562; *Swift & Co. v. Tempelos*, 178 N. C., 487; 7 Words & Phrases, 6180 and 6181. The "weiner" of the witness is a small sausage of unknown contents, and is here commonly called a "hot dog," as stated in the case. To a great many people it is a palatable and appetizing article of food, notwithstanding the implication attaching to one of its names. So far as the case shows, the defendant's place of business was conducted in an orderly manner, and he sold nothing but simple food to his customers. He was conducting a restaurant and is fully protected by the words of the proviso exempting that class of business from the operation of the statute.

The witness called the place a "weiner joint," but there is nothing in this case to show that to be a just or correct designation of it, if it was meant by the term to imply that the restaurant was not kept in a decent or orderly manner. A "joint" is usually regarded as a place of meeting, or resort, for persons engaged in evil and secret practices of any kind, as a tramps' joint, such a place as is usually kept by Chinese for the accommodation of persons addicted to the habit of opium smoking, and where they are furnished with pipes, opium, etc., for that purpose, and called an opium joint, or generally speaking, a rendezvous for persons

of evil habits and practices. If, in this sense, the words were intended as an opprobrious epithet, the evidence utterly fails to disclose that this place was not properly conducted, in every way, or that there has been the slightest disturbance of the peace and quiet of the community by reason of any disorderly or improper conduct therein. So far as appears there was absolutely nothing done that would mar in the least the proper and peaceful observance of the Sabbath, no more than there would be in a well conducted hotel or in one's home. Food and drink are necessary to the sustenance of man and the statute was not intended to prohibit the furnishing of them to patrons when there is, in no other respect, a violation of the law alleged or shown.

It was error to submit the case to the jury and to refuse the nonsuit. The verdict will be set aside, and judgment of nonsuit will be entered in the Superior Court, which shall have the force and effect, as provided by statute (Acts of 1913, ch. 73; Gregory's Suppl., sec. 3265a), of a verdict of not guilty.

Error.

STATE AND CITY OF CHARLOTTE v. H. D. KIRKPATRICK.

(Filed 28 April, 1920.)

1. Health—Statutes—Cities and Towns—Ordinances—Sale of Milk—License—Monopolies—Appeal—Constitutional Law.

An ordinance of a city authorized by statute, requiring a license from those having dairies either within or without the city limits and selling milk therein, is not objectionable as tending to create a monopoly by a provision that it may be suspended or revoked for cause, or that no provision has been made for an appeal from the health authorities, the action of the authorities not being arbitrary and the question capable of being raised, in appropriate instances, by indictment, or by an application for mandamus, or by an action for damages.

2. Health— Statutes— Legislative Discretion— Cities and Towns— Ordinances—Courts.

The reasonableness or unreasonableness of an ordinance passed under the express provision of a valid statute, requiring a license from the sellers of milk within the corporate limits of a city, may not be inquired into by the courts, this question being solely within the discretion of the Legislature.

3. Health—Milk—Statutes—Ordinances—Cities and Towns—License—Discrimination—Constitutional Law.

An ordinance requiring those selling milk within the corporate limits of a town, to obtain a license from its health authorities, with provision that it should not prevent the owner of two cows from disposing of his surplus milk if not peddled or vended, precludes the meaning that such

owners may sell or come in competition with those of whom the license is required, and is not objectionable as an unlawful discrimination.

4. Health—Mandamus—Milk—License—Revocation—Orders in Force.

In proceedings in mandamus to compel municipal authorities to issue a license for the sale of milk within the city limits, which had been revoked by the city authorities under a power contained in an ordinance authorized by statute, the order revoking the license will remain in force in order that unsanitary milk may not be sold pending the legal investigation.

APPEAL by defendant from *Shaw, J.*, at September Term, 1919, of MECKLENBURG.

The defendant was convicted of selling milk within the city limits of Charlotte without having first obtained a permit from the health authorities of said city, and was fined $5 and costs, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Clarkson, Taliaferro & Clarkson, Cansler & Cansler, Stewart & McRae, and T. L. Kirkpatrick for defendant.

CLARK, C. J. The appeal raises the question of the validity of the ordinance of the city of Charlotte, sec. 116, subsec. 2, which provides: "No person, firm, or corporation shall engage in the sale, handling, or distribution or production of milk for sale in the city of Charlotte, nor shall any person ship any milk into the city of Charlotte until he has obtained a permit therefor from the health authorities of said city. This permit shall be renewed on or before the first day of July in each year, and may be suspended or revoked at any time for cause. Each person applying for a permit shall pay to the city tax collector the sum of $1 for each renewal thereof," and specifies what the application for the permit shall include.

It is admitted by the defendant that within two years prior to the issuing of the warrant he was engaged in the business of selling milk in the city of Charlotte, and that he did so without having obtained the permit required by said ordinance, and that the dairy operated by the defendant from which milk was so furnished and delivered in Charlotte was located without the proper limits of the city, and that the defendant had more than two cows in his dairy. On the facts admitted the defendant moved for a nonsuit, which was denied, and the Court instructed the jury that if they believed the evidence to return a verdict of guilty, and they so found.

The legislative authority for the enactment of the ordinance in question is found in subsecs. 10 and 12 of sec. 57, ch. 276, Pr. Laws 1915

(the charter of Charlotte), and is as follows: "The board of aldermen shall have power and authority, by ordinance duly enacted:

"(10) To provide for inspection of all dairies inside and outside of the city limits, doing business within the city, and to regulate and maintain a standard for milk sold in the city; to provide for and regulate the inspection of all foodstuffs offered for sale in the city of Charlotte, and to impose license fees on all persons engaged in any of said business."

"(12) To require any owner or occupant of a dairy, grocery, meat, fish, or other market place, any restaurant or eating place, any blacksmith shop, slaughtering house or stable, to cleanse or operate same in such manner as may be necessary for the health, comfort, and convenience of the inhabitants."

In the growing intelligence of the age, we have learned that there are few matters as important to the public welfare as the public health, as to which we are truly "our brother's keeper," for if by neglect disease is allowed to prevail among any class of people, however small or obscure, the entire community may become infected, and that proper preventatives cannot be efficiently administered except by government or municipal control, which reaches all sections and all classes. Such legislation was formerly unknown when population was sparse, the people poor, and knowledge of public hygiene almost entirely lacking. We now know that prevention is far more efficient than the attempt to cure, and official supervision, formerly unknown, is now deemed a necessary element in government, National, State, or municipal, and legislation authorizing regulation is now universally held constitutional.

An ordinance very similar to this was sustained in *Asheville v. Nettles*, 164 N. C., 315. In that case the ordinance, which was as detailed, as in this, went further, for it measured the amount of the license by the number of cows in each dairy, taxing them $1 a head. The ordinance in this case requires the payment of only $1 for the permit, the permit to be renewed on or before 1 July each year.

The defendant attacks the validity of the ordinance on three grounds:

"1. That it tends to create a monopoly through the power of revocation of permit vested in the city health authorities." This permit is to be obtained from the health authorities of Charlotte, and "it may be suspended or revoked at any time *for cause.*" Neither the statute, nor the ordinance, permits the revocation of these permits arbitrarily, but only for cause. This necessarily involves a trial whether the question is presented by indictment of the defendant for selling without license, or by application for *mandamus* or by an action for damages, though necessarily the order revoking the license, or refusing to renew it, must remain in force in order that insanitary milk may not be sold pending

the legal investigation. If, on such trial, it is found that the revocation or refusal to grant the license was arbitrary and unjustified, the court would grant a *mandamus* for the issuance of the license, and the applicant would doubtless recover damages for injury to his business.

The defendant does not complain of any particular feature of the ordinance, for it nowhere appears in the record that he ever applied for a license, and it is not alleged that it was arbitrarily refused him. Nor is there any allegation or evidence that the ordinance was unreasonable. In *Lawrence v. Nissen,* 173 N. C., 359, it is said: "If passed by virtue of express power, an ordinance cannot be set aside for mere unreasonableness, since questions as to the wisdom and expediency of a regulation rest alone with the law-making power."

2. The defendant contends that the ordinance is invalid because it contains "no provision for appeal from the action of the health authorities."

If there was such arbitrary action it could be shown as a defense on an indictment or as ground for a *mandamus* to require the license to be issued, or in an action for damages whichever should be appropriate upon the facts, and an appeal would lie from the judgment. The ordinance on its face is valid, and the defendant has no ground of complaint for arbitrary conduct of the health authorities for he has refused to apply for a permit and has sold milk in Charlotte without a license. He has taken the law in his own hands and adjudged that the ordinance is invalid or that, for some reason which is not stated, he is exempt from its authority.

3. The contention of the defendant seems to be rested principally upon the ground that secs. 6 and 7 of the ordinance are discriminatory. Sec. 6 is as follows: *"Effect on owner of two cows.* Nothing in this ordinance shall be construed to prevent the owner of two cows from disposing of his surplus milk, provided such milk is not peddled or vended." Sec. 7 provides that a violation of the ordinance subjects the party to a penalty of $10 for each violation (but this section shall not apply to any person or persons owning not more than two cows), and each day that any violation is allowed to continue shall constitute and be a separate and distinct offense." The defendant's chief contention, therefore, seems to be that the exemption of a person engaged in the business, if he owns less than two cows, makes the ordinance invalid, but it will be seen that it does not exempt the owner of two cows "if the milk is peddled or vended." The intention evidently was that where a party owned only two cows it should be admissible for him to dispose of the surplus milk by giving it away or otherwise "provided such milk is not peddled or vended"; that is, its disposition is not brought in competition with those who sell milk.

In *Lawrence v. Nissen,* 173 N. C., 359, the Court said: "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges *under the same conditions.*"

There is no evidence here to justify any contention that the ordinance is not within the scope of the authority constitutionally conferred by the Legislature, or that by its terms the ordinance is unreasonable. The contention is that it is discriminatory, but we do not find that in this instance there has been an unreasonable and illegal discrimination.

In *S. v. Medlin,* 170 N. C., 682, it was held that under Rev., 2923, an ordinance "which prohibited the opening of all places of business on Sunday except drug stores, and permitting them to sell *quasi*-necessities, such as mineral waters, soft drinks, cigars, and tobacco only during certain hours of the day was not invalid." In *S. v. Davis,* 171 N. C., 809, it was held that "an ordinance imposing a fine of $25 upon drug stores for selling cigars, etc., on Sunday, and a fine of $5 for the same offense upon restaurants, cafes, and lunch stands related to different occupations, and in the absence of any finding that those engaged in these occupations come in competition with each other, the ordinance will not be declared invalid upon the ground that it is discriminatory against the owners of drug stores." In *S. v. Burbage,* 172 N. C., 876, it was held that an ordinance prohibiting the pursuit of any ordinary business calling on Sundays is not invalid, as discriminatory, by reason of an exception in favor of drug stores.

In L. R. A., 1917, ch. ....., at p. 243, the whole subject of regulation of the sale and distribution of milk is discussed in *Chicago v. R. R.* (275 Ill., 30), with copious notes of decisions upon every phase of such regulation.

Milk is a most facile absorbent and distributor of the germs of disease, especially contagious diseases. The traffic therein must be regulated to safeguard the public health. The requirement of the license is even more to insure a correct census and effective supervision of all milk dealers (over 100 in Charlotte) than for aid in defraying the cost of supervision. The grievance of the defendant is both the supervision and the tax. But it cannot concern him that the owners of not more than two cows are exempted from the tax when they are liable with all others if dealers. The exemption embraces only those who raise their own supply of milk, and are not competitors in selling milk. This is neither unreasonable nor discriminatory.

No error.

STATE v. RALPH CONNOR AND SINCLAIR CONNOR.

(Filed 5 May, 1920.)

1. Conspiracy—Homicide—Evidence—Common Law—Circumstantial Evidence.

A conspiracy among several, resulting in a murder in the first degree may be shown by circumstantial evidence, or implied from the words and conduct of the parties or the previous facts and circumstances leading up to the killing, making all equally guilty with the one committing the act, and it is not necessary that the parties entered at the same time therein or had expressly agreed thereon.

2. Same—Arrest—Murder—Trials—Questions for Jury.

Where two brothers knew that the sheriff was present to arrest one of them for a criminal offense and before the act both had declared themselves armed with pistols and that the arrest should not be made, and at the time of the attempted arrest the sheriff showed his warrant and was fired upon by the one named therein and the other, knowing the circumstances pressed forward through the by-standers with threatening words and drawn pistol and deliberately fired upon and killed the sheriff. *Held*, the evidence is sufficient of a conspiracy, or the previous meeting of the minds of the prisoners in a common design to kill, and proper for the determination of the jury upon the question of murder in the first degree.

3. Instructions—Reading from Decisions—Generalities—Abstract Propositions.

Where the trial court reads from a decision of the Supreme Court of this State applicable in principle to the one being tried, without adopting the facts therein, but applies it to the evidence, it is not objectionable as a glittering generality or an abstract proposition. *S. v. Jones*, 87 N. C., 547, cited and distinguished.

4. Instructions—Narrative of Facts—Expression of Opinion.

Where the trial court properly applies the principles of law applicable to the evidence in the case, his statement of the testimony to the jury, telling them it was only to refresh their memory and that they must be guided by their own recollections, cannot be held objectionable, as an expression of opinion.

5. Conspiracy—Criminal Law—Trials—Questions of Law—Questions of Fact—Instructions—Homicide—Murder—Declarations.

In an action for conspiracy resulting in a homicide, it is for the court to determine whether the conspiracy has been sufficiently shown for the evidence to be considered by the jury, but when it is, it is correct for the judge to instruct them that if they so found, the act done by one of them in furthering the unlawful design, is the act of all, and declarations made by one, at the time, is to be considered against all.

6. Conspiracy— Criminal Law — Arrest— Degrees of Murder— Intent— Statutes—Instructions.

There being evidence of conspiracy on a trial for a homicide that the defendants, being brothers, R. and S., had armed themselves with pis-

tols, for the declared purpose of preventing the arrest of one of them, S., under a warrant, by the sheriff, with threats to kill; that the one to be arrested, S., fired upon the sheriff, but the sheriff, slightly wounded, shot him in return, and the other, R., hearing the shot, pressed forward through the by-standers, who tried to detain him, declaring he would kill the man who shot his brother, and fired into the sheriff from behind and killed him; *Held*, a charge was correct that, as to defendant R., the jury could render a verdict either of guilty of murder in the first or second degree or not guilty; and as to S., guilty of murder either in the first or second degree, or guilty of an assault with deadly weapon with intent to kill (Laws of 1919); and as to both defendants, that if they entered into a conspiracy merely for the purpose of resisting an officer, but not with the intent to kill, they would be guilty of murder in the second degree.

APPEAL by prisoners from *Adams, J.*, at October Term, 1919, of IREDELL.

The prisoners were convicted of the murder in the first degree of Lloyd Cloaninger, who at the time of the killing was deputy sheriff of Iredell. The deceased, under a warrant from a justice of the peace, was commanded to arrest Boizy Conner and one of the prisoners, Sinclair Conner, under a charge of assault with a deadly weapon upon one Farin. On Sunday, 3 August, 1919, a large crowd of negroes, and some whites, were attending a camp meeting at Morrow's Grove, a negro church. Among these were the prisoners, Ralph Conner and Sinclair Conner, and their brother, Boizy Conner, the last two being defendants in said warrant, and all three it seems armed with pistols. The deceased officer, accompanied by two other officers, Furr and Broom, of Mooresville, went to the camp meeting ground about 3 p.m. to serve the warrant against Sinclair Conner and Boizy Conner. Before the actual attempt to serve the warrant both of them were informed that the officers were in search of Sinclair to arrest him, and both were armed with pistols. Sinclair, inquiring where the officer was, went toward Cloaninger and asked him: "What in the hell does all this mean?" The deceased, Cloaninger, having the warrant in his hand, told Sinclair, "You are under arrest; be quiet," to which Sinclair replied: "No God-damned man shall arrest me!" Then, crouching behind a tall black negro he drew his pistol and opened fire upon Cloaninger. Cloaninger returned the fire. The only wound that Cloaninger seems to have received at this time was a slight one in one of his arms, whereas Sinclair Conner was so badly wounded that after dodging behind an automobile he fell at the foot of a tree some distance off. Cloaninger and the two other officers followed him to the tree, where Cloaninger was trying to ascertain the extent of Sinclair's wounds, and to get a car to take him to some physician for attention. While this was going on,

Boizy Conner came up and attacked Cloaninger, but without a weapon. Cloaninger used a blackjack in defending himself from the attack of Boizy. Furr and Broom, the other officers, then seized Boizy, and while they were holding him Ralph Conner, the other defendant, breaking through the crowd which was trying to restrain him, and declaring that he would kill the damned white man who had shot his brother, came up behind Cloaninger and fired two shots into his body. One of these shots was not fatal; the other, that which passed through Cloaninger's bowels, was the cause of his death." Testimony of H. C. Furr; of Dr. Henry Long; Johnson Gabriel. Miles Wilson testified: "I was at the camp meeting on 3 August; walked there between 12 and 1 o'clock. I saw Sinclair and Ralph Conner as I was going; they were on the road between church and the woods, about 100 yards from the church. There were four of them abreast together, Sinclair, Ralph, Boizy, and another fellow with uniform shirt and blue pants—I didn't know him. They were talking when they passed me, and went around right in front of me up to the church. I was going up to the camp ground; they were going along in front of me, and I heard them say—Sinclair said, 'I don't intend to be arrested by any damned man, white or anybody.' Said, 'I have got as good a gun as any man ever shot.' And Ralph said, 'Yes; and I have got as good a gun as any man, and I will use it if I have to.' "

John Wally testified: "I was at George Mayhew's on 3 August, and was at the camp ground that morning about 11 o'clock. I saw Sinclair Conner there, walking around through the crowd. There was a soft drink stand there, and Sinclair came up and made a remark about the sheriff. Some other fellow walked up when he came—they were getting dopes, Sinclair among them. Ralph and Boizy came up and called to him, and he left."

And again: "It was a few minutes after 4 o'clock when I saw Sinclair, Ralph, and Boizy at the soft drink stand. I went to Mr. Mayhew's and got dinner and was at the dope stand at 4 o'clock. The dope stand was three or four hundred yards from the camp ground. While I was standing there, Sinclair came up and asked something about the sheriff, and somebody said, 'There is the sheriff over there,' and he said, 'No; that is a boy; he can't arrest me. I am talking about the big sheriff.' And after he made this remark, Ralph and Boizy came up, called to him as they started off, going in the direction of the preaching stand; I heard them murmuring; I could not understand what they said as they went off, about three or four hundred yards, and about 4 or 5 o'clock I heard the report of the pistol."

The State relies upon this evidence of Wally as particularly important under the question of conspiracy. It places the three brothers together after Sinclair had the deceased pointed out to him, and declared that he would not be arrested.

Dick Craven, after testifying in regard to the first gunfiring between Sinclair and the deceased, proceeded: "When they finished they backed so that I could sorter see Cloaninger, and the other fellow went back behind my machine, went down to some trees, and another negro on my other side attracted my attention. He said, 'That is my brother; they can't arrest him!' He was about ten feet away (then he says he was fifty feet). He was pressing on with the crowd with a pistol in his hand. Four or five old colored women were holding him; he was pressing on and telling them, 'Get back or I will shoot!' He advanced further on and another colored man got between them, and he said, 'Get out of my way! This is my brother; they cannot arrest him!' He was using profane language. He said, 'God damn, get out of my way! That is my brother; nobody can take him!' He said, 'I have a 13-shooter and will use it!' And everything that got in his way, he made get out of his way—had the pistol in his hand. He was moving, advancing all the time, going down the way he saw Cloaninger—down there where this other fellow fell."

The evidence is that this other negro was the prisoner, Ralph Conner. There was a verdict of guilty of murder in the first degree as to both prisoners, and the capital sentence was imposed by the judge, from which both appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

L. C. Caldwell, E. B. Jones, and R. T. Weatherman for prisoners.

CLARK, C. J. The prisoners declined to introduce any testimony. There are 12 assignments of error to the charge, and 6 to the testimony. The exceptions, broadly speaking, present two contentions for the prisoners: 1. That there was no sufficient evidence of a previous conspiracy between the prisoners to compass the death of the deceased. 2. That there was no sufficient evidence to submit to the jury, independent of that concerning the conspiracy to murder, against the defendant Ralph Conner.

The prisoners' exceptions 1, 2, 3, 4, 5, and 6 are all based on the theory that there was no evidence of such conspiracy. All these exceptions are to the admission or exclusion of testimony. Assignment of error 1 is that the judge, in charging and defining what is a conspiracy in law, said: "It is not necessary to constitute the offense that the parties should have come together and agreed in express terms to unite for a common object. A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." This is substantially the fifth syllabus in *S. v. Knotts,* 168 N. C., 173. To the same purport, *S. v. Davis,* 177 N. C., 573.

The court then proceeded to incorporate in his charge the following, which he told the jury was a quotation from *S. v. Knotts:* "In this connection I direct your attention to a concise statement of this principle contained in case of *S. v. Knotts,* decided by the Supreme Court of this State. 'As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete. This joint assent of minds, like all other facts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence. Individuals who, though not specifically parties to the assault, are present and consenting to the assemblage by whom it is perpetrated are principals when the assault is in pursuance of a common design. There may be no special malice against the parties slain, nor deliberate intention to hurt him, but if the act was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow. Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specially agreed upon or understood, each conspirator becomes responsible for the means used by any conspirator in the accomplishment of the purpose in which they are all at the time engaged. It makes no difference at what time any one entered into the conspiracy; it may be, as we have seen, and indeed must be some time before it is fully executed."

The prisoners contend, under the first assignment, that there could not be an implied conspiracy unless there were words or acts to support it, and that they were lacking in this case.

There was evidence that the three brothers were together between twelve and one o'clock, when Sinclair declared he would not be arrested; that he had as good a gun as any man ever shot; and Ralph said: "Yes; and I have got as good a gun as any man, and I will use it if I have to." Then there is testimony that Sinclair was looking up the deceased and swearing as he did so that no man should arrest him; that he opened fire upon the officer almost immediately upon coming into his presence; that Ralph forced his way through the crowd, pistol in hand, swearing and threatening to kill the officer, and coming up behind the officer fired two shots, without notice and without warning, into his body, killing him.

From these facts and circumstances the jury might infer a previous conspiracy or coming together of their minds to kill any officer who attempted to arrest Sinclair. If there was such conspiracy or agreement, both these prisoners were rightfully convicted of murder in the first degree. All six of the assignments to the testimony were based upon the theory that there was no evidence of such conspiracy, and cannot be sustained.

In reading the above excerpt from *S. v. Knotts* as to the definition of conspiracy, the court did not adopt the facts in that case, nor was it a glittering generality, or an abstract proposition of law forbidden by what was said in *S. v. Jones,* 87 N. C., 547, for the judge correctly applied the law to the evidence.

The prisoners' assignments of error 3, 4, and 5 are to the judge's statement of the testimony to the jury. We find no just ground of complaint. He told the jury it was only to refresh their memories, and they must be guided by their own recollection of what the witnesses said. Both before, and thereafter, the judge made the application of the law of conspiracy to the facts as testified to.

Assignments of error 6 and 7 are that the court did not submit the question of murder in the second degree as to Ralph Conner. The court charged the jury, as appears from the record, as follows: "As to Ralph Conner, you may return one of three verdicts—guilty of murder in the first degree, or guilty of murder in the second degree, or not guilty." Assignment of error 8 is to the judge's statement of the law of conspiracy as applicable to the aspects of the testimony in this case, but we find no error therein. His Honor told the jury, "The evidence supporting a conspiracy is generally circumstantial; it is not necessary to prove any direct act, or even any meeting of the conspirators, as the fact of conspiracy may be collected from the collateral circumstances of each case. It is for the court to say whether or not such connection has been sufficiently shown, but when that is done the doctrine applies that each party is an agent for all the others, so that an act done by one, in furthering the unlawful design, is the act of all, and a declaration made by one, at the time, is evidence against all." This is sustained by 2 Whart. Crim. Ev., p. 1432.

In the assignments of error 11 and 12 the prisoners insist that the court was in error to submit the charge of murder in the first degree against Ralph Connor, because there was no evidence.

There was testimony which justified the jury in finding that there was a conspiracy between the prisoners to be inferred and indeed previous to the killing.

On reviewing the entire testimony, if believed by the jury, and which the prisoners did not see fit to attempt to contradict, the deceased and the other officers of the law came with a warrant to arrest the two brothers, Boizy Conner and Sinclair Connor, and both these men and their other brother Ralph were armed, and upon learning of the intention of the officers to arrest them Sinclair declared his intention not to be arrested, and Ralph concurred by declaring also his intention to use his weapon to prevent it; Sinclair fired at the officer, Boizy also came up and attacked the officer, but without a weapon, and when two of the

officers arrested, and were holding Boizy, Ralph Conner, the other prisoner, breaking through the crowd, which was trying to restrain him, came up behind the officer, declaring he would "kill the damned white man who had shot his brother," and fired two shots into his body, killing him. This surely was sufficient evidence, if ever there could be such—of murder in the first degree, and exceptions 11 and 12 cannot be sustained.

The court instructed the jury that as to Ralph Conner they might return one of three verdicts. "Guilty of murder in the first degree; guilty of murder in the second degree, or not guilty." And as to Sinclair Conner, "Guilty of murder in the first degree; guilty of murder in the second degree, or guilty of an assault with a deadly weapon, with intent to kill, in breach of the Act of 1919."

The charge of the court is very full and complete, and presents every reasonable hypothesis in favor of both the prisoners. Besides charging fully as to what constituted a conspiracy, the court instructed the jury: "The State must further satisfy the jury, beyond a reasonable doubt, that said conspiracy between the prisoners was formed and entered into by them prior to the time that the fatal shot was fired. And that if they found, from the evidence, that the prisoner entered into such conspiracy for the purpose merely of resisting the officer, but not to the extent of taking his life, if necessary, the prisoners under the circumstances recited, nothing else appearing, would be guilty of murder in the second degree." In the able charge the judge carefully protected the rights of the prisoners in every aspect, and we find no error as to either of the prisoners.

No error.

STATE v. LESLIE HINES.

(Filed 2 June, 1920.)

Homicide—Murder—Evidence—Self Defense—Threats.

Where the only evidence in a trial of murder is self-defense, a witness may not testify of previous threats of the deceased to take the prisoner's life in the absence of evidence that such had been communicated to the prisoner, or that he was aware thereof at the time of the homicide.

APPEAL from *Daniels, J.*, at August Term, 1919, of LENOIR.

The prisoner was convicted of murder in the second degree, and appealed from judgment thereon.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Shaw, Jones & Denton and Rouse & Rouse for defendant.

CLARK, C. J. There is but one assignment of error presented. The prisoner by his testimony set up self-defense. The court excluded the testimony of Dr. Dempsey, witness for the defendant, that the deceased had threatened the prisoner, saying that she was going to kill him. The court excluded this upon the ground that "there was no evidence that the threat was communicated to the prisoner, and that he knew of it."

In *S. v. Blackwell,* 162 N. C., 682, the Court held, quoting from *S. v. Byrd,* 121 N. C., 684, that evidence of the general character of the deceased as a violent and dangerous man is admissible, when there is evidence that the killing was done in self-defense, and also where the evidence is wholly circumstantial and the character of the transaction is in doubt, saying: "We think that threats made by the deceased against the prisoner come under the same rule. If the threats are not communicated to the prisoner, and the character of the deceased is unknown to him, such evidence is not admissible when offered only to show self-defense, because facts of which the prisoner had no knowledge could have no effect upon his mind. *S. v. Turpin,* 77 N. C., 473; *S. v. Hensley,* 94 N. C., 1022; and *S. v. Rollins,* 113 N. C., 722."

However, the prisoner having been recalled, testified that she had threatened him, saying she was "going to kill him," and Dr. Dempsey, the same witness whose testimony had before been ruled out, was permitted to testify that "The deceased said she was going to kill him." When the testimony was ruled out, the court excluded it because "there was no evidence that the prisoner knew of it," but when the prisoner later testified, on being recalled, that the deceased made the threat, the same witness, Dr. Dempsey, was recalled, and allowed to testify in the language previously excluded, that "she said that she was going to kill him."

No error.

STATE v. ED ALEXANDER.

(Filed 2 June, 1920.)

1. Homicide— Murder— Evidence— Declaration— Written Statements— Burden of Proof.

Upon a trial for murder, a written statement made by the deceased as to the facts constituting his murder, when aware of the opinion of his attending physician that he would not live through the night, comes within the principle of the competency of dying declarations, made under an impending sense of approaching death, and may be introduced by a witness present at the time, and aware of the circumstances under which it was made, with the burden of proof on the State to show such circumstances beyond a reasonable doubt.

2. Homicide—Murder—Defenses—Insanity— Evidence— Opinions— Self Serving Declarations.

Under a plea of insanity as a defense for murder, witnesses may testify to facts from which the jury may infer the unfounded apprehension of the prisoner that an enemy would attack him, but may not express an opinion as to the existence of this as a fact, or why the prisoner did not carry a weapon; and the prisoner's statement of why he did not do so, is a declaration in his own behalf; but under the evidence in this case, it is held to be immaterial.

3. Homicide—Murder—Insanity—Evidence—Declarations.

Declarations of the prisoner on trial for murder and relying upon the plea of insanity, in defense, must in themselves be evidence of the unsound condition of his mind at the time he committed the offense, to be competent.

4. Homicide— Murder— Insanity— Evidence—Experts—Conversations— Declarations.

The testimony of an expert on mental diseases in behalf of a prisoner being tried for murder and pleading insanity as a defense, is competent of conversations with the prisoner tending to show that he was unresponsible when he committed the crime, but they must not incorporate therein the self-serving declarations of the prisoner that shed no light on the condition of his mind at that time.

WALKER, J., concurs in the result.

APPEAL by prisoner from *Shaw, J.*, at January Term, 1920, of IREDELL.

The prisoner convicted and sentenced for the murder in the first degree of James Rayle, appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. B. McLaughlin, R. L. Wright, Dorman Thompson, and W. D. Turner for prisoner.

CLARK, C. J. There seems to be no conflict as to the circumstances of the homicide, which were given in by eye-witnesses, and which somewhat condensed are as follows: On the night of 23 December, 1919, in a poolroom at Statesville, the prisoner, Ed. Alexander, went up to Jim Rayle, the deceased, and put his arm around his neck and commenced boring him in the ear with his right arm, which was a stub of an arm. Rayle put up his arm and pushed him over, but did not hit the prisoner, who got up and said: "You are mad at me, aren't you?" and repeated it two or three times. The deceased told him he did not want any one boring him in the ear with the nub of his arm. The prisoner stayed around there five minutes, and then walked out of the room, and in

about three-quarters of an hour returned and came down the south aisle of the building, and when he got to the pool table where Rayle was, he called him a vile epithet, and cursed him and commenced shooting. The deceased had not said a word when the prisoner came back with his gun.

G. R. Reynolds, who testified as above, further said Rayle was standing over the desk and was playing pool, and witness was keeping tally on a slate. When Alexander began shooting he walked up to the pool table where Rayle was playing with his hand in his pocket, and when he got up to the table he jerked the gun out of his pocket before he opened his lips and called Rayle and cursed him, calling him a vile name and commenced shooting across the pool table. Rayle started up the aisle towards the front door, and when he got about 20 feet to the end of the second table he turned around and faced the prisoner with the most horrified expression on his face, the witness says, he ever saw on any man, and the prisoner shot him again, and the deceased fell. When Rayle fell he said: "Oh God, some one help me up." The witness says he went under the table, as he was somewhat between the two men, and afraid he would get shot himself. There were three more shots fired by the prisoner after Rayle fell. The first shot the prisoner fired was across the pool table, and Rayle started towards the front door, and when he turned around and faced Alexander, the latter fired the second shot. The deceased fell, and Alexander shot three more after he fell, standing over the deceased while lying on the floor. It was a 45-calibre pistol. The first shot fired towards Rayle missed him, probably two feet. Two of the bullets went straight down in the floor where Rayle was lying, the first shot went through an inch and a quarter plank and then through the wall. After the prisoner had fired the 5 shots he went out the back door. He came in the front door when he fired the first shot. Reynolds further said: "When he came in the room the first time he didn't look like he was mad, but when he returned after three-quarters of an hour's absence and drew his pistol he looked like he was mad when he came in. There were 50 or 75 people in the room. He passed by all but four people before he got to Rayle." The witness says he dived under the table after he fired the second shot. It was about 9 o'clock at night. Rayle stayed in the building half or three-quarters of an hour after he was shot. The witness took his head in his lap after the shooting was over, and Rayle said: "He just didn't give me the chance of a dog, did he?" Witness replied: "No; he didn't." We laid him on the pool table. Dr. Cloninger said there was not much use to take him away. He died about 2:30. There was one hole in his side. The bullet went in and lodged in his back. He was not bleeding when they laid him on the table. Witness did not

hear Rayle say anything to Alexander after Rayle fell, and while Alexander was still shooting at him. The only word Rayle spoke was, "Oh, God, some one help me up." Witness says he did not observe Alexander was there when he came back till he saw him walking down the aisle. The first time was about 7:40, and not so many people there. When the prisoner came in then he put his arms around the witness's neck and seemed to be friendly, and they went out the door together. He told the witness that he had not had but three drinks that day. The prisoner's right arm was about half off.

Barron Moore gave substantially the same evidence. I. J. White testified that he was there at the time of the homicide, and the first time he saw Alexander was when he advanced up the table and shot right down between the tables where Rayle was lying. He saw the fourth and fifth shots. After the fifth shot the prisoner went between two tables and turning his back to the wall he seemed to be loading his gun. He seemed to be walking straight, did not look like there was anything wrong with him.

C. L. Gilbert testified that he was a policeman, and that night after the homicide he and his son were looking for the prisoner and saw him coming through a little pasture in the lot back of Thompson's garage. He was coming towards the fence. The witness went to meet him, and when in 8 or 10 steps of him he covered Alexander with his gun and told him to throw up his hands, which he did, and said: "That is all right. I have no gun. It is all off." The witness sent for Johnson, another policeman, who brought his auto up. They helped the prisoner across the fence, when he said: "I haven't got any gun." The witness then said to him, "Ed., you have played the devil tonight," and he said, "I don't give a God-dern. I don't allow any man to do me like he did and get by with it." When they came out on the street there was a considerable crowd in front of the pool room, and he wished to go through them, but I would not let him do so. The witness had him by the arm, and Alexander asked him twice to turn him loose. This was 25 or 30 minutes after the shooting. The prisoner seemed to be perfectly cool. Didn't seem excited at all. The witness has never been able to find the pistol.

Lee Fulp testified that after the first shot was fired he ran out, and when he came back he met the prisoner near the back porch, who asked what he was running for, and the witness said to get out of the way of those bullets. The next thing he said was, "He knocked me down, didn't he?" Prisoner asked him this twice. He then said: "Don't tell any one you saw me." He had his gun holding it up to his breast with his stub, and was working it with his left hand, making a noise. The witness said he could tell he was drinking some—not drunk.

Mrs. L. A. Thompson testified that Alexander came to her house that night about 9 o'clock and said: "I came after my gun." And soon after said: "I must go," and went off. My son called from his room and said: "Ed., what are you going to do with that gun?" And he said, "I am going possum hunting." She says by "gun" she meant a pistol. It was an army pistol which her husband had borrowed about two months before when he went on a deer hunt. Her house is a little over a quarter of a mile from the poolroom. When the prisoner came in she does not think he had been drinking; did not see anything wrong with him. There was evidence from the nurse and doctor and the undertaker proving that the bullet was the cause of the death.

Indeed, there seems to be no conflict as to that or the details of the killing, and the defense set up is insanity.

The first exception was to the admission in evidence of the statement signed by the deceased. Lorene Johnson, a trained nurse, stated that the deceased "told Mr. Cornelius that the doctor had told him he was going to die, and he asked me how long I thought he would live? I told him I did not know; that we hoped he might live through the night." Soon afterwards he said to Mr. Cornelius, "Ed. has killed me. The doctor says I am going to die." About 25 minutes after this conversation he made the statement which was put in writing and read over to and signed by him, which is as follows: "I was sitting on the desk in the pool room when Ed. come in; he put his arm around my neck, then put his fist against my head. I shoved him back against the door and Ed. fell. He got up and said: 'You took advantage of me, didn't you?' He said, 'I will get the advantage of you,' and went out, and was gone about 20 minutes. First thing he said when he got back was, 'I got you now, you damn son of a bitch.' As he threw up his pistol he fired a shot and missed me. The next shot hit me and I fell. He then ran around the pool table and shot me again. I could not say whether he hit me or not, the next shot. I said, 'Ed., don't kill me.' He was loading or trying to load his pistol again when I last saw him while I was still on the floor.

"This was read over to me, and I signed this statement. This 23 December, 1919. J. C. RAYLE."

The witness testified that Dr. Cloninger, the sheriff, the gentleman who wrote down the statement, H. L. Troutman, and herself were present when the statement was read over and signed by the deceased, who, when he was asked to sign the statement, inquired how long he would live, and was told he "might live through the night."

The evidence shows that the deceased made this statement under an impending sense of approaching death, and it was competent. *S. v. Cain,* 178 N. C., 724; *Lumber Co. v. R. R.,* 151 N. C., 220; *S. v. Finley,*

118 N. C., 1161; *S. v. Caldwell,* 115 N. C., 794; *S. v. Whitt,* 113 N. C., 716; *S. v. Whitson,* 111 N. C., 695; *S. v. Williams,* 67 N. C., 12.

Exceptions 2, 3, and 4 are to the exclusion of answers to questions to Mrs. W. M. Alexander, mother of defendant, who was being examined as to the mental condition of the defendant, said: "During these times I have just described I think his mind was badly deranged. The only restraint that was given was just through kindness. I humored him. We were all afraid of him. One night Edgar came home. He imagined a man up town had done him an injustice, and he came in and said he was going to get his gun and go back, but a friend came with him. Together we got him quieted down, and he didn't go out any more that night." She was then asked: "Did he imagine somebody was an enemy to him?" The court, upon objection, excluded the answer to this question. The witness can be required to state the facts upon which she bases her opinion that the defendant was insane. She could state facts from which the jury may infer that the enemy whom he was going to attack was purely imaginary, but she could not express an opinion as to the existence of a fact as she was asked to do here. The same may be said to exception 3 for the exclusion of the question, "Why didn't he carry a pistol or gun or a knife." Exception 4 was for the exclusion of the answer to the question, "Did he himself state why he didn't keep a knife or gun?" This was calling for a declaration of the prisoner on his own behalf. The witness had already testified to such facts as threw light upon the mental condition of the prisoner at that time. The answer to this question was immaterial to the issue as to his sanity.

Exception 5. The brother of the defendant, a soldier in service, had testified that in his opinion the defendant was insane, and was giving facts upon which he based his opinion: "We were walking along the street. Edgar made some remark that should not have been said in the presence of ladies. I corrected him for it. He jumped on me and beat me. I didn't fight him back, and I held him until some of my comrades came by and we got him quieted down, and went on off—took my lady friend back home. When I went back to the barracks Edgar was in my bed—he was sleeping in my bed at the time. He was asleep when I went down that night, about 10:30. I asked him next morning—"

This was offered to show by this witness that he didn't know anything the next morning, and the judge excluded it because "the witness does not state that the prisoner was not drunk at the time that this assault was made upon him. The other evidence in the case shows that defendant did drink frequently, and became wild under the influence of liquor. His forgetfulness then, if he did forget, of what occurred the afternoon before would not tend to show that he was insane. Any declaration

made by him in order to be admissible in his favor must plainly be in itself evidence of his insane condition."

Exceptions 6 and 7. The expert, Dr. J. K. Hall, had been testifying at great length for the defense when the following occurred: "Defendant proposes to show by the witness that in an examination of Edgar Alexander, the defendant, relative to his history and of the crime he is charged with, and the answers that he made to such questions to the expert under the examination formed the basis of his conclusion of the mental condition of the defendant.

"The State only objects to so much of the examination as brings out the declarations of Ed. Alexander and the conversation with him. No objection to the conclusions he reaches."

"The jury is sent out while the court examines the witness. After the jury came in, the court told the jury as follows: 'The witness is permitted to state to the jury any act that was performed by the defendant in his presence, or any declaration or statement made by the defendant in his presence upon which he based his opinion as to his mental condition. But the witness is not permitted to state any declarations which may have been made to him by the defendant as to events that had happened in his past life, or his statement of any declarations that he may have made in his past life for the purpose of basing his opinion as to the mental condition of the defendant.'"

Again, the court restated his ruling as follows: "The ruling is that you are not permitted to state what the witness told you about his past life, and not to consider what he told you about his past life; but if there is anything in the manner in which he told you things that made you form your opinion, then that would be competent. In other words, if he said anything at the time that indicated to your mind that he was a man of unsound mind, the manner in which he did it would be competent, and you may narrate it; but if your opinion is based upon what he told you about the past transaction, it would not be competent."

His Honor in these rulings was drawing a distinction between facts drawn out in Doctor Hall's conversation with the defendant, which tended to show the state of defendant's mind and those which did not. Conversation with one alleged to be insane is, of course, one of the best evidences of the present state of his mind. If, however, there is incorporated in the conversation self-serving declarations which in themselves do not throw any light upon the present condition or the past condition of the man's mind, then these declarations are not admissible.

"The opinion of a physician based in part, at least, on representations made to him by the defendant or others prior to his trial, on the question of his insanity, cannot be considered in a criminal prosecution." *United States v. Faulkner,* 35 Fed., 730.

"An expert witness in a criminal prosecution cannot give his opinion as to the sanity or insanity of the accused at the time of the criminal act, based upon the story told by the accused himself, which is not in evidence, especially when the statements were made by the defendant long after the criminal act." *People v. Strait,* 148 N. Y., 566. The same Court, in *People v. Nino,* 149 N. Y., 217, draws the distinction between the two classes of declarations by the defendant thus: "All that this defendant said and did during these several examinations by the experts was competent, as bearing upon his mental condition at the time he was examined. It is quite true that the declarations of a defendant to an expert on insanity, as to past transactions and events, are not competent evidence to determine his mental condition at some time previous to the examination. *People v. Hawkins,* 109 N. Y., 408; *People v. Strait,* 148 N. Y., 566. We have no such situation presented here. This is not the case of a man claimed to be insane at the time of the homicide, and admitted to have been sane ever since. This is a case where it was asserted that the defendant had been continuously insane from a period of four months before the killing up to the time of trial. The examination of the experts was directed to his mental condition at the time they saw him; and from the conclusion they then reached, and the medical and other facts proved, they would be competent to give, on the trial, an opinion as to his sanity or insanity at the time of the homicide. The jury are entitled to the facts on which an insanity expert bases his opinion, and when those facts are the result of his own interviews with the defendant, it is not only competent, but necessary, that they should be laid before the jury."

There were 12 witnesses for the State, on insanity, each of whom testified that they had known the prisoner well for many years, one for 20 years, several for 12 or 15 years, others for a shorter period, all of whom testified in effect that he was a man of sound mind, and had shown no indication of insanity. These men were summoned from all classes and vocations in the town where he lived: J. R. Hill, merchant; J. E. Dietz, in the furniture business; Bob Armfield, in the clothing business; W. E. Blackwell, locomotive engineer; B. A. Cowan, depot agent; D. M. Ausley, bank cashier; W. H. Cornelius, lumber dealer; R. L. Sloan, in the clothing business; G. R. Reynolds, who was also witness to the homicide; Hal Gill, one of prisoner's associates; J. M. Deaton, former sheriff, now in automobile business; George Ayres, in transfer business, who had often taken him to and from the railroad station—all these who knew him well and had often met him expressed the opinion that he was of sound mind. Some of them said he drank a little, and had been in several fights and in jail.

The witnesses who testified to acts from which the jury were asked

to infer that his mind was unbalanced were his mother, two brothers, his sister, and his aunt. His former teacher, Prof. Matt Thompson, testified only that he did not come regularly to school, and was not studious, and that he had to use corporal punishment, but he did not say that his mind was affected. His brother, who gave the incident above recited of his using improper language in the presence of a lady, did not testify that he was insane. There were three witnesses who testified that the mother of the prisoner had told them that he had got a lick on the head when he was a child, and that some doctor had told her that some time he would become insane, but they did not testify that he was. One of these witnesses for the prisoner also testified that the prisoner "had been in a good many fights around town," and another of them, on cross-examination, said, "I have never seen anything wrong with his mind—there was nothing to matter with him except he was mean as hell." His uncle, ex-treasurer of Mecklenburg County, testified that the prisoner's mother had told him, "She had been expecting Ed. to get into trouble," but he had never heard of his having any mental trouble, nor of his having any lick on his head. The only other witness for the prisoner as to his mental condition was the expert, who, under our system, is selected and summoned, not by the court, but like witnesses to the fact, by the side for which his testimony is expected to be favorable. The testimony as to the prisoner's mental condition is thus summarized, as it was practically the only issue in the case. The sanity or insanity of the prisoner was a fact for the jury, who, under a charge not excepted to in this particular, have found the prisoner not to be of insane mind, and that he was responsible for his act. The ruling excepted to in regard to the expert was not prejudicial to the result.

The deceased received two bullets, both passing through his body and his intestines. He was struck down by the second shot the prisoner fired. The other bullet was one of the three fired at him while lying on the floor, the prisoner standing over him. The witness, Reynolds, said the first shot missed the deceased two feet and went through the side of the house, whereupon the deceased started for the front door, he being unarmed. The deceased was a married man, and left a wife and three children.

Exception 8. The judge charge the jury that the burden was upon the State to satisfy them beyond a reasonable doubt both that the deceased made the statement offered as dying declarations, and that he did so under the apprehension of immediate death. And unless they did so find both these facts, they should disregard it entirely.

Upon the uncontradicted testimony the deceased, in consequence of what he deemed an undue familiarity, pushed the prisoner down, who

thereupon, with a threat, left the poolroom, going to Mrs. Thompson's residence, something over a quarter of a mile off, got an army pistol, and returning to the poolroom some 45 minues later passed through a crowd of 50 or 60 people down to the table where the deceased was playing pool. Without any notice, and using an oath with a vile epithet, fired at the deceased, who started for the door. But in about 20 feet off he turned and the prisoner fired again. He then fell to the floor, and the prisoner going up to him fired three more shots down at him while lying on the floor. Two bullets passed through him, causing his death. The prisoner then left the building, and was met by the witness Fulp, to whom he said: "Don't tell any one you saw me." Later that night the policeman who was searching for him found him passing through a back lot behind a garage, and arrested him. The dying declarations of the prisoner are in evidence.

The defense of insanity was set up. There was no direct evidence of insanity, but his mother and other near relatives were allowed to testify in regard to his past conduct from which it was contended that the jury could draw the inference that he was insane, and the expert gave in his evidence as a matter of opinion. There was evidence from 12 witnesses of the State, and on cross-examination one of the prisoner's witnesses, who had known him for years, that he was sane. The court seems to have allowed the fullest latitude on the evidence offered of individual acts of the prisoner to justify the inference that the prisoner was insane. The jury found to the contrary.

The prisoner was most ably defended by eminent counsel. We think he has had a full and fair trial, and has no cause to complain, which would entitle him to a new trial.

No error.

WALKER, J., concurs in result.

STATE v. M. A. BEAM.

(Filed 2 June, 1920.)

Intoxicating Liquors— Evidence— Collateral Crimes— Motive— Intent— Statutes.

Where there is evidence that defendant had liquor in his possession for the purpose of sale, in violation of the statute, evidence that he had liquor in his possession and had sold the same a year previous in another county, is not so connected with or related to the offense charged as to be competent to show the intent or guilty knowledge in committing the same, nor is it within the reason of the rule which admits evidence of collateral crimes to prove motive or intent.

STATE *v.* BEAM.

CRIMINAL ACTION, tried before *Shaw, J.*, at January Term, 1920, of IREDELL.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. P. Grier and Dorman Thompson for defendant.

WALKER, J. The defendant was indicted for selling liquor and for having liquor for sale. There was evidence as to the sale of the liquor and of its possession for the purpose of sale at Morrow's Grove camp meeting the first Sunday of August, 1919. In order to show that the defendant had the liquor in his possession for sale the State proposed to prove that a year before the time of this transaction the defendant had liquor in his possession, and sold the same to several persons. This evidence was admitted, and the defendant excepted. The ruling was erroneous. When offenses are so connected with, or related, to each other that the commission of one tends to show the intent with which the other was committed, it becomes competent to introduce evidence of the commission of an offense of the same sort as that being investigated for the purpose of showing intent, but when the crimes are wholly independent of each other, even though they are crimes of the same kind, such evidence, being irrelevant, is inadmissible. 12 Cyc., 495; *Gray v. Cartwright,* 174 N. C., 49. There are some exceptions to the rule, but this case does not fall within any of them. It was held in *S. v. Murphy,* 84 N. C., 742, that evidence of a collateral offense of the same character, and connected with that for which the defendant is being tried, and tending to prove his intent, or *guilty knowledge,* when that is an essential element of the crime, is admissible. But the two offenses, in this case, have no such connection or relation as to make the possession and sale of liquor in Lincoln County evidence of the intent or purpose with which the defendant had possession of liquor in Iredell County one year afterwards. It may also be said that the transactions are so widely separated in respect to time and place, and are so clearly void of any connection with each other, that they cannot be brought within the reason of the rule we have stated, admitting evidence of collateral crimes to prove motive, or intent. The cases of *S. v. Winner,* 153 N. C., 602; *S. v. Stancill,* 178 N. C., 683, and *S. v. Simons, ibid.,* 679, and Wharton Cr. Ev. (10 ed.), p. 60, so much relied on by the State, are not authorities for its position, being based on a different state of facts, and upon reasons entirely inapplicable to the question now presented. We said in *S. v. Stancill, supra:* "The testimony as to the theft of the Wilkinson tobacco was offered merely to show the intent with which the defendants stole this tobacco, and not to prove the accu-

sation substantively. It was sufficiently connected with the main charge to render it competent for this purpose. The tobacco was all taken to Raymond Stancill's, the common storehouse for the loot of these defendants. It was but a part of a series of transactions carried out in pursuance of the original design, and it was contemplated by them in the beginning, that they should plunder the tobacco barns in the neighborhood, and this was one of them. The jury might well have inferred this common purpose from the evidence. Robbing Wilkinson was a part of the common design, and done in furtherance of it. Proof of the commission of other like offenses to show the *scienter,* intent, or motive is generally competent when the crimes are so connected or associated that this evidence will throw light upon that question."

There must be another trial to correct the error in admitting the testimony to which the defendant objected.

New trial.

CASES FILED WITHOUT WRITTEN OPINIONS

Browder v. Nuseoco Club. (No. 264.)

Carrow v. Waters. (No. 14.)

Chapman v. Lumber Co. (No. 507.)

Chatham v. Realty Co. (No. 448.)

Colbert v. S. A. L. (No. 411.)

Cole v. Boyd. (No. 415.)

Cole v. Boyd. (No. 416.)

Corrugated Bar Co. v. Green. (No. 313.)

Evans v. Winston-Salem R. R. Co. (No. 361.)

Gilkey v. Contracting Co. (No. 509.)

Gordon v. Pintsch. (No. 410.)

Martin v. Bunker. (No. 358.)

Mitchell v. Melton. (No. 99.)

Pegram v. Town of Canton. (No. 589.)

Redmond v. Wright. (No. 332.)

Smith v. Fleming. (No. 178.)

State v. Crowder and Liles. (No. 401.)

State v. Gheen. (No. 465.)

State v. McLawhorn. (No. 161.)

Staton v. Cobb. (No. 58.)

Tayloe v. Tayloe. (No. 106.)

Westall v. Burleson. (No. 505.)

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1. *Actions—Defenses—Pleadings—Pendency of Actions—Dismissal—Statutes.*—A demurrer to a complaint alleging the prior pendency in another county of an action upon the same subject-matter between the same parties, will be sustained, Rev., 474 (3); and, when such allegations do not so appear in the pleading, objection to the pendency of the second action may be taken by answer. Rev., 477. *Allen v. Salley*, 147.

2. *Same—Counterclaim—Judgments.*—The entire spirit of our code procedure is to avoid multiplicity of actions, and where an action for damages arising by tort from a collision between automobiles has been brought by one of the parties, he may successfully plead the pendency of this action to one brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the second action being by way of counterclaim, Rev., 481 (1); and that different relief may be asked for by each in his own action does not affect the fact that the subject of both actions is the same acts or transactions, to be determined by one judgment either for the plaintiff or defendant in the case. Rev., 563 (2). *Ibid.*

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3. *Actions—Consideration—Parties—Multiplicity of Suits—Statutes—Insurance, Fire—Equity.*—Several insurance companies issued policies of fire insurance in various amounts on the owner's property, which was destroyed by fire set out by a railroad company, and each of the companies paid off its respective loss and all of them then brought several actions against the railroad company alleging negligence. The first action coming on for trial, the judge granted plaintiff's motion to consolidate all the actions, to bring in the owner of the destroyed building as a necessary party, and to allow amendments to the several complaints to meet the change from separate actions to the form of the consolidated one: *Held*, the general principles as to the law of negligence being the same in each of the actions, the motion for consolidation was properly allowed, with permission to amend the pleadings, under the provisions of our statutes to have all matters of controversy settled in one action, when it can be done without prejudice to the rights of any of the parties, or to a fair and full trial and consideration of the case. Rev., 409 to 414, inclusive, and 469. *Ins. Co. v. R. R.*, 256.

4. *Actions—Service—Summons—Judgments—Independent Action.*—Where, upon appeal from a demurrer to the complaint in an independent action to set aside a judgment for want of service of summons, it appears of record that the summons had not been served, the action will be sustained, for it is subject to collateral attack; otherwise it will not be, for then the remedy is by motion in the original cause. *Stocks v. Stocks*, 285.

5. *Same—Fraud.*—Where there are allegations in the complaint sufficient to establish the fact that a judgment sought to be set aside in an independent action was procured by the fraud of defendant, a demurrer thereto is bad, for the remedy is not by motion in the original cause. *Ibid.*

6. *Same—Evidence.*—The complaint in this suit alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right: *Held*, sufficient for her to maintain an independent action to set aside the former judgment upon the issue of fraud, and also under our statute to remove the former judgment as a cloud upon her title. Rev., 1589. *Ibid.*

7. *Actions—Consolidation—Insurance—Negligence.*—Several insurance companies having commenced their separate actions against the same defendant for negligently setting fire to and damaging or destroying the lumber of the same insured: *Held*, the court has the power, upon motion, to consolidate the several actions into one, and to make the insured a party under the authority of *Ins. Co. v. R. R.*, *ante*, 255. *Ins. Co. v. R. R.*, 390.

8. *Actions—Negligence—Insurance—Damages—Payment—Subrogation—Indivisible Actions—Agreement of Parties—Pleadings—Acquiescence*

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2. *Alimony—Husband and Wife—Liens—Judgments—Sale of Land—Statutes.*—When alimony *pendente lite* has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described in the complaint and situate here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. Rev., 1566. *Ibid.*

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1. *Appeal and Error—New Trials—Substantial Error.*—A new trial will not be granted on appeal unless upon some substantial ground of error, or where it appears that the error could not have been harmful to the appellant. *Campbell v. Sloan*, 76.

2. *Appeal and Error—Witness Tendered—Cross-examination—Record—Purpose—Result.*—The question as to whether a party has the right to cross-examine a witness who was only tendered, as a witness for the party tendering him will not be considered on appeal, when the purpose of the examination and the expected result is not made to appear. *Howard v. Mfg. Co.*, 119.

3. *Appeal and Error—Objections and Exceptions—Evidence—Exceptions—Requests for Instructions.*—A general exception to the admissibility of evidence, competent in part, will not be considered on appeal, unless it is properly asked to be restricted to the purpose for which it was competent, or in the absence of special requested instructions in regard to it. *Beck v. Tanning Co.*, 123.

4. *Appeal and Error—Prejudicial Error—Damages—Fires—Evidence—Negligence.*—In an action to recover damages for the alleged negligent burning of the plaintiff's lumber, evidence as to the price paid by plaintiff for the timber from which the lumber was manufactured is but slight, or negligible, proof of the latter's value, and its exclusion is without substantial prejudice to the defendant's right when taken in connection with the other testimony of the witnesses giving more definite and accurate information as to the value of the lumber. *Porter v. Lumber Co.*, 138.

5. *Appeal and Error—Judgment Modified—Premature Appeal—Costs.*—The appeal in this case may have been dismissed as premature, and the judgment appealed from being modified, the costs are taxed equally between the parties. *Burger v. Cooper*, 141.

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7. *Appeal and Error—Summons—Publication—Affidavits—Amendments—Divorce—Case Remanded—Superior Court—Evidence—Jury.*—The Supreme Court has the power to permit an amendment therein to an affidavit made for the publication of a summons; but where the action is for divorce *a vinculo*, and the defect is in omitting the averment that the defendant cannot after due diligence be found in this State, and it is admitted that the defendant is a nonresident and at the time embraced by the publication, was absent from the State, the Supreme Court may remand the case to the Superior Court to hear and consider the evidence, and the Superior Court judge, for the purpose of being advised, may submit the question to a jury. *Davis v. Davis*, 185.

8. *Appeal and Error—Assignment of Error—Record—Certiorari.*—An assignment of error will not be sustained which contradicts the statement in the record on appeal, in the absence of a correction of the record accordingly by *certiorari*. *Bell v. Harrison*, 191.

9. *Appeal and Error—Reference—Findings.*—The findings of the court, when passing upon the report of a referee, are conclusive on appeal when based upon legal evidence. *Lumber Co. v. Trust Co.*, 211.

10. *Appeal and Error—Objections and Exceptions—Motions to Dismiss—Actions—Judgments Final.*—Upon the refusal of a motion to dismiss an action the movant should enter his exceptions and appeal from a final adverse judgment, but the allowance of the motion is final, permitting the adverse party to appeal. *Clements v. R. R.*, 225.

11. *Appeal and Error—Objections and Exceptions—Evidence—Counties—Roads and Highways—Damages.*—Where the commissioners of a county are sued by the owner of lands for damages for taking a part thereof for a public road or highway, and the defendants do not appeal from an instruction of the court that the jury could only consider in diminution the special benefits to the land, when under a statute applicable they could also have considered the general benefits to lands in that vicinity, they cannot on appeal take advantage of the error so committed. *Elks v. Comrs.*, 242.

12. *Appeal and Error—Harmless Error—Evidence—Cancellation—Canceled Mortgages.*—Where the wife claims the lands of her husband after his death by adverse possession under a deed from a third person as color, which, under all of the evidence, is insufficient as to the length of time, the introduction of a canceled mortgage given by her husband and herself, does not bear upon the controversy, and will not be held for reversible error. *Hancock v. Davis*, 282.

13. *Appeal and Error—Evidence—Nonsuit.*—On an appeal from a judgment as of nonsuit upon the evidence, the Court will construe the evidence in the light most favorable to the plaintiff, if it tends to establish his contention. *Jones v. Taylor*, 293.

14. *Appeal and Error—Harmless Error—Trials—Counsel—Improper Remarks.*—Improper remarks of counsel in the argument are rendered harmless where the judge promptly interposes and sufficiently cautions the jury in respect to them. *Ibid.*

15. *Appeal and Error—Objections and Exceptions—Prayers for Instruction—Assent.*—An exception cannot be maintained that the judge left the

APPEAL AND ERROR—*Continued.*

amount of damages sought in the action to the determination of the jury when there is no exception to his charge, or requests for special instructions thereon, it being for the defendant to enter his exceptions, either to the instructions given or to the failure to give special instructions thereon aptly tendered, and his failure to have done so is deemed as his assent to this treatment of the questions presented. *Harris v. Turner*, 322.

16. *Appeal and Error—Instructions—Evidence—Vendor and Purchaser—Carriers of Goods—Freight Charges—Railroads.*—Where the evidence is conflicting as to whether the agent of the seller of fertilizers agreed to deliver them freight paid by him over a logging road beyond that of the common carrier by rail, and afterwards the seller's agent, before the goods were shipped, agreed with the purchaser by parole that the logging road freight charges would be paid by the seller, though not so specified in the original and written contract, and as to whether the seller's agent had the authority to make the parol agreement and as to whether the purchaser was notified, before shipment, of this want of the agent's authority and agreed to take the goods under the original written contract, and as to whether the agent had the authority to bind his principal by the parol agreement, *Quaere?;* and held that a charge that limited the inquiry to the mere making of the agreement between the agent and defendant as to the payment of the freight charges over the logging road, and omitted to instruct upon the evidence relating to the purchaser's notice of the agent's limitation of authority, before shipment, and of the defendant's waiver of the parol agreement and his ordering the shipment out of the goods under the original written agreement, is reversible error. Rev., 535. *Mfg. Co. v. McPhail*, 383.

17. *Appeal and Error—"Moot" Questions.*—Where the question on appeal is a "moot" question, the Supreme Court will not decide it. *Lumber Co. v. Valentine*, 423.

18. *Appeal and Error—Cities and Towns—Ultra Vires—Ordinary Powers.* Where the question of *ultra vires* is not raised by assignment of error or brief in an action against a city upon the contract with regard to its streets, sewers, etc., it will be assumed on appeal that the defendant is vested with the usual authority to construct such work within its limits, and to contract with regard to it. *Lambeth v. Thomasville*, 452.

19. *Appeal and Error—Issues—Objections and Exceptions.*—When the appellant is dissatisfied with the issues submitted on the trial, he should except thereto, tender the ones he thinks proper, and assign error relating thereto; and where the pleadings involve an issue which has not been tendered by the appellant, he may not, for the first time, take exception in the Supreme Court, that it was not submitted to the jury. *Drennan v. Wilkes*, 513.

20. *Appeal and Error — Reference — Findings — Evidence— Transcript.*— When the evidence upon which a referee has based his findings of fact do not appear in the transcript of the case on appeal, the Supreme Court will not review such findings, and they will be sustained. *Caldwell v. Robinson*, 518.

APPEAL AND ERROR—*Continued.*

21. *Appeal and Error—Costs.*—When the appeal is reversed by the Supreme Court, with direction for the restatement of an account between the parties, the appellee will be taxed with the cost thereof. *Seawell v. McIver*, 536.

22. *Appeal and Error—Objections and Exceptions—Unanswered Questions.* Upon exception to the ruling out of questions asked a witness upon the trial, it must be shown what the answers were expected to have been, so that the Court may pass upon their relevancy and materialty on appeal, or the exception will not be considered. *Hall v. Hall*, 571.

23. *Appeal and Error—Findings—Judgments—Motion to Set Aside—Movant's Notice—Evidence.*—The finding, without evidence, by the trial judge as to lack of notice, on a motion to set aside a judgment in an action wherein service of summons had been made by publication, is insufficient, and a finding that the defendant had no notice whatever will not be allowed to control on appeal, especially when the record shows that he had attempted a compromise after knowledge of the action and before judgment, through his attorney. *White v. White*, 592.

24. *Appeal and Error—Alimony—Judgments.*—An order allowing the wife alimony *pendente lite* her action for divorce may be declared erroneous on appeal for insufficiently full findings of fact therein, but not void. *White v. White*, 593.

25. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—Objection to the manner in which the trial judge has stated the contentions of the complaining party should be made at the time, to avail him of his exception on appeal. *Hall v. Giessell*, 657.

26. *Appeal and Error—Remarks of Court—Wills—Undue Influence—Mental Capacity—Harmless Error.*—Where, upon the trial of a caveat to a will, the issues of mental capacity of the testator and undue influence have been submitted to the jury, and of the latter, there has been neither evidence or controversy, and the jury held there was not undue influence, the remarks of the trial judge of the high character of the counsel who drew the will, though they may have been prejudicial to the caveators on the issue of undue influence, are immaterial and not reversible error. *In re Finch*, 696.

27. *Appeal and Error—Certiorari—Court's Discretion.*—A writ of *certiorari* as a substitute for an appeal is not a matter of course when the appeal has not been prayed for, but within the exercise of the discretion of the court in passing upon the application. *S. v. Simmons*, 700.

28. *Same—When Taken.*—A petition for a *certiorari* as a substitute for an appeal to the Supreme Court should be made "at least at the call of the district" to which the appeal should have been taken, and it must appear that the petitioner was prevented from taking the appeal or was misled, or that he had a legal excuse for failing to file his petition earlier; and ignorance of the rules of practice or inability to employ counsel is insufficient. *Ibid.*

28½. *Appeal and Error—Certiorari—Merits.*—The merits of the case are not passed upon on an application in the Supreme Court for a *certiorari*. *Ibid.*

APPEAL AND ERROR—*Continued.*

29. *Same—Criminal—Accessory Before the Fact—Statutes—Criminal Law.* The petitioner for a *certiorari* as a substitute for an appeal was charged with arson, and upon the trial of another charged with the same offense, and as an accessory before the fact, he testified of his own free will, after being warned and without inducement, that he had burned the dwelling, being induced thereto by the prisoner then being tried; and on his own trial, that he had not done the burning, etc.: *Semble*, this conflict of testimony involved a finding of fact that this first testimony was perjured; and further, the charge of accessory before the fact includes that of the principal crime. Rev., 3269, and the court could accept the plea of defendant under the charge of arson; and, therefore, no error of law would be found regarding the case as if on appeal, upon its merits. *Ibid.*

30. *Appeal and Error—Courts—Discretion—Evidence.*—Upon trial for selling intoxicating liquors in violation of our statute, after the defendant and his witnesses had testified in his behalf and in rebuttal, a State's witness testified that he was present and had seen the sale charged. The defendant offered himself and his witness to contradict this witness, and the court refused, stating in the presence of the jury that the defendant and his witnesses had already testified as to this fact: *Held*, the refusal of the judge was a matter within his discretion in the conduct of the trial, and there being no evidence of its abuse, it was not reviewable on appeal. *S. v. Sessoms*, 717.

31. *Appeal and Error—Jurors—Courts—Discretion.*—The finding of the trial judge upon supporting evidence that a juror is indifferent is not reviewable on appeal. *S. v. Bailey*, 724.

32. *Appeal and Error—Witnesses—Evidence—Harmless Error—Irrelevant Evidence.*—A question asked a witness for the accused of a homicide, who had set up an alibi in defense, as to a statement the defendant had made that he had been confined to his bed under a physician's care, is an attempt to bring out a declaration in the prisoner's favor, and not prejudicial to him, if erroneous; and the evidence is irrelevant when not in corroboration of the prisoner's evidence. *Ibid.*

33. *Appeal and Error—Harmless Error—Witness—Evidence—Conversation—Contradiction.*—The admission of testimony to contradict the prisoner's witness as to his conversation with another, will not be held for reversible error when it does not appear to have prejudiced the accused on trial for a homicide. *Ibid.*

34. *Appeal and Error—Criminal Law—Sentence—Judgment—Statutes—Case Remanded.*—Where a conviction for vagrancy has been legally had under Rev., 3740 (7), and the sentence has been imposed of imprisonment for twelve months allowed under the Act to Suppress Prostitution, ch. 215, Laws of 1919, the case will be remanded for the imposition of the proper sentence. *S. v. Walker*, 730.

ARBITRATION.

Arbitration—Consideration Implied—Fair Dealings—Breach of Agreement—Notice—Revocation—Actions—Liquidated Damages.—The parties to an agreement to arbitrate impliedly agree not to attempt to unduly affect the award, and the breach of which by the one party justifies a revocation by the other. Where a party to such an agree-

ARBITRATION—*Continued.*

ment designedly gets a material witness for the opposing party so drunk that he may not be able to testify on the hearing before the arbitrators, the party for whom this witness was to testify may give prompt notice of his revocation of the agreement and bring his action to assert his original rights: *Semble,* the injured party, had he so chosen, could have sustained his action to recover the amount of liquidated damages specified in the agreement to arbitrate. *Wynne v. Lumber Co.*, 320.

ARGUMENT. See Removal of Causes, 3; Evidence, 25.

ARREST. See Conspiracy, 2, 4.

ASSENT. See Appeal and Error, 15.

ASSETS. See Public Sales, 1; Trusts, 3; Corporations, 10, 11.

ASSIGNMENT. See Trusts, 1, 2, 4.

ASSUMPTION OF RISKS. See Employer and Employee, 2, 9; Instructions, 5; Evidence, 18.

ATTACHMENT. See Carriers of Goods, 4; Judgments, 13.

1. *Attachment—Affidavit—Intent to Defraud—Grounds for Belief—Courts.* The affidavit upon which a warrant of attachment has been issued is fatally defective which alleges that the defendant is about to assign, dispose of, and secrete the money or goods with intent to defraud creditors without setting forth the grounds upon which this belief is based so as to enable the court to adjudge of their sufficiency. *Bank v. Cotton Factory,* 203.

2. *Attachments— Pleadings-- Judgments— Alimony-- Liens.*— The allegations of the complaint particularly describing the lands situate here of the nonresident husband sought to be subjected to the wife's claim for alimony in her suit for divorce, and the judgment therein directing it to be sold accordingly, practically amount to an attachment of the lands indicated. *White v. White,* 592.

3. *Attachment—Statutes—Domestic Corporations—Appeal and Error—Findings.*—An attachment against the property of a domestic corporation, within the jurisdiction of the court, may be issued if none of its officers can be found in this State after due and diligent search, Rev., 957, when this fact exists at the time of its issuance, and the finding by the court thereof, on legal evidence, is conclusive on appeal. *Grain Co. v. Feed Co.*, 654.

ATTORNEY AND CLIENT. See Evidence, 25.

Attorney and Client—Principal and Agent—Contracts—Quantum Valebat Damages.— In the absence of agreement upon a certain sum, an attorney may recover the reasonable value for the services he has rendered his client; and where there is evidence that it is in a certain amount, the trial judge may not properly instruct the jury that it is excessive, or be required to set aside the verdict therein as a matter of law. *Forester v. Betts,* 681.

ATTORNEY IN FACT. See Tenants in Common, 3.

AUCTION. See Estates, 10.

AUTOMOBILES. See Bailment, 1; Negligence, 3, 4, 5; Taxation, 11, 12, 14.

BAGGAGE. See Railroads, 15.

BAILMENT.

1. *Bailment—Garage—Automobiles—Ordinary Care—Negligence.*—The defendant owner of a garage, who has received the plaintiff's automobile for repairs, is regarded as a bailee, and is not liable for the failure to return the property in good condition when he has observed the ordinary care devolved upon him by his bailment. ***Beck v. Wilkins***, 231.

2. *Same—Burden of Proof—Res Ipsa Loquitur—Evidence—Nonsuit—Trials.*—Where the owner of a garage receives an automobile for repair, and it is destroyed by fire in the garage after the owner had called for it at the time specified, but kept longer therein for the garage man to repair it, in his action for damages the owner of the automobile has the burden of proving, throughout the trial, that the damage was caused by the defendant, but having shown the destruction of his machine by fire, as stated, the defendant must go forward with his proof to rebut the *prima facie* case established, under the doctrine of *res ipsa loquitur*, and a judgment as of nonsuit upon plaintiff's evidence will be denied. *Ibid.*

BALLOTS. See Elections, 2.

BANKRUPTCY.

Bankruptcy—Betterments—Measure of Damages—Statutes.—The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another with his consent, in fraud of the rights of his creditors, may recover as for betterments, the value of the improvements to the land, but not a greater amount so expended, Rev., 655, which will be a lien upon the lands; and a judgment that if it be not paid at a certain date the land be sold for cash, after due advertisement, by a commissioner appointed by the court, is correctly entered. *Garland v. Arrowood*, 697.

BANKS AND BANKING. See Usury, 1; Bills and Notes, 4; Taxation, 9.

BENEFITS. See Counties, 2; Principal and Agent, 3, 4; Bills and Notes, 5.

BETTERMENTS. See Bankruptcy, 1.

BILL. See Criminal Law, 1.

BILLS OF LADING. See Carriers of Goods, 1, 2, 4.

BILLS AND NOTES. See Principal and Agent, 3, 6; Nonsuit, 1; Carriers of Goods, 4; Cities, 1; Trusts, 4; Evidence, 13.

1. *Bills and Notes—Negotiable Instruments—Purchaser after Maturity—Equities—Notes.*—The purchaser, after maturity, of a note secured by a chattel mortgage takes subject to the equities existing between the original parties. *Wikins v. Welch*, 266.

2. *Same—Corporations—Officers of Both Corporations—Notice.*—Where a corporation is a purchaser of a note after maturity from another corporation, and knowledge of outstanding equities is had by the proper officer of the selling corporation, who occupies the same position with the purchasing one, it is also notice to the latter. *Ibid.*

BILLS AND NOTES—*Continued.*

3. *Bills and Notes—Want of Consideration—Presumptions—Burden of Proof—Statutes—Notes—Negotiable Instruments.*—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee, as a defense, in an action thereon, the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payer to a judgment in his favor; and the maker's mere conclusion as to the fact constituting his defense is insufficient, when his testimony is itself insufficient to establish it. Rev., 2772. *Bank v. Andrews*, 341.

4. *Same—Evidence—Banks and Banking—Verdict Directing—Trials—Instructions.*—The defendant was an endorser on a note given to a bank, of a corporation of which he was president, his corporation doing its business at the payee bank, and defendant at another bank, and relied as a defense in an action by the payee thereof to recover thereon, the want of consideration therefor. His evidence, and the only evidence in the case, tended to show, that he had given the payee bank two checks on his own bank for two amounts, at the request of the officer of the payee bank, one of which was for interest to discount an extension on his own personal paper, and the other, interest for like purpose, on the paper of his corporation, and that the payee bank did not pay him "on that day" the money on the note, or any one else at his request: *Held*, insufficient to rebut the presumption raised by his endorsement on the note, that he received value therefor, and the court was not in error in directing verdict on the evidence should the jury find the facts accordingly. *Ibid.*

5. *Bills and Notes—Collaterals—Indorser—Purchase—Benefits—Estoppel.* Where a second note and mortgage has been given in renewal of the first, under agreement that the latter should be canceled, which was not done, and the mortgaged premises has been sold under the first, and the proceeds applied to a note which the payee had given to another, an endorser on the payee's note, who has paid off the balance and holds the collateral, may not retain the benefits he has received under the mortgage sale, and repudiate the obligations of the transaction as to the renewal note, of which he had knowledge at the time. *Green v. Ruffin*, 346.

BILL OF PARTICULARS. See Pleadings, 9.

BILLS OF PEACE. See Courts, 4.

BONDS. See School Districts, 1, 2; Contracts, 10; Taxation, 10; Municipal Corporations, 5, 7; Elections, 3; Landlord and Tenant, 7; Elections, 1.

BOUNDARIES.

Boundaries—Evidence—Hearsay—Declarations—Deceased Persons—Surveyors—Interest.—Under the rule admitting declarations of deceased persons as evidence of boundaries, the person making them must have been disinterested at the time, they must have been made *ante litem motam*, and by a person since deceased; and a paper-writing or memoranda made by a surveyor, since deceased, as to boundaries pointed out by a deceased owner in favor of his own title, are doubly incompetent, as hearsay, and as coming from an interested person, and their admission is reversible error. *Timber Co. v. Yarbrough*, 335.

BREACH. See Arbitration, 1; Pleadings, 13; Issues, 2; Husband and Wife, 9; Landlord and Tenant, 3; Vendor and Purchaser, 2.

BUILDING INSPECTORS. See Mandamus, 4; School Districts, 2.

BURDEN OF PROOF. See Bailment, 2; Evidence, 8, 28; Fraud, 5; Libel and Slander, 4; Bills and Notes, 3; Title, 2; Railroads, 13; Homicide, 1, 3.

BY-LAWS. See Principal and Agent, 6; Corporations, 5.

CAFE. See Sunday, 1.

CANCELLATION. See Appeal and Error, 12.

CAPITAL OFFENSE. See Courts, 21.

CAPTIONS. See Insurance, 3.

CARRIERS. See Railroads, 11, 12, 13, 14; Negligence, 10.

CARRIERS OF GOODS. See Appeal and Error, 3; Instructions, 8; War, 1.

1. *Carriers of Goods—Bills of Lading—Railroads.*—An instrument issued to the consignor by the carrier, receipting for the goods delivered to it and agreeing to transport the same to their destination, is a bill of lading. *Aman v. R. R.*, 310.

2. *Same—Omission to Issue Bills of Lading—Relationship of Consignor and Carrier—Interstate Commerce—Statutes—Regulations—Interstate Commerce Commission.*—Where a bill of lading has not been issued by the carrier or a receipt of goods for transportation, the rights of the shipper and the duty of the carrier are to be determined by the common law, and their relationship of carrier and shipper may be created without any written bill of lading, and while for an interstate shipment a written bill of lading should always be issued, as evidence of the contract of the parties, yet, if the same is omitted, the requisite stipulations of the bill or contract, as prescribed by the Federal statutes, or valid regulations of the Interstate Commerce Commission, will attach and govern the rights of the parties. *Ibid.*

3. *Carriers of Goods—Carrier and Consignor—Evidence—Weight of Evidence—Questions for Jury—Trials.*—Evidence that the plaintiff paid the freight charges to the carrier on a shipment, which was received by the carrier, and that a detailed statement of the whole transaction was filed with the carrier charging it with having accepted the goods; that they remained in its possession for months before and after the action was brought, without its objection or denial of the facts in any manner, is sufficient to establish the relation of consignor and carrier between the parties, and to permit a recovery for a part of the goods which was lost, the weight of the evidence being for the jury to determine. *Ibid.*

4. *Carriers of Goods—Railroads—Attachment—Freight—Advance Charges Liens—Continued Transportation—Bills of Lading—Vendor and Purchaser—Bills and Notes—Order Notify.*—When a shipment of freight by common carrier by rail is to consignor, notify the purchaser, with bill of lading attached to draft, which the purchaser pays, but refuses the shipment as not according to a certain test agreed upon, and there being back-freight charges on the shipment to the consignor

CARRIERS OF GOODS—*Continued.*

and reshipped upon the same car, not appearing on the purchaser's bill of lading, except as "advance charges," in proceedings in attachment by the purchaser to recover the money he had paid to the consignee: *Held*, the back-freight charges constituted a lien on the shipment in the carrier's favor, and enforcible out of the proceeds of the sale under the proceedings in attachment. *Lumber Co. v. R. R.*, 359.

5. *Carriers of Goods—Connecting Carriers—Freight—Advance Charges—Subrogation—Equity.*—Where a common carrier pays the charges of a preceding carrier in the transportation of a shipment of goods, it is subrogated to rights of that carrier and may demand the entire freight charges before surrendering the shipment. *Ibid.*

6. *Carriers of Goods—Railroads—Vendor and Purchaser—Attachment—Demurrage—Liens.*—Where demurrage charges have accrued on a consignment of goods by reason of attachment proceedings in a controversy between the vendor and purchaser upon the refusal of the plaintiff to pay its proper freight charges, the carrier has its lien for the demurrage thus caused. *Ibid.*

7. *Carriers of Goods—Negligence—Delay in Delivery—Destination—Mistake—Similar Names—Fertilizer—Damages to Crop—Railroads.*—Where a consignee sues a railroad company for its negligent delay of a shipment of nitrate of soda causing damages to his tobacco crop, and there is evidence tending to show that the defendant had a station known as Woodley's Siding on its road to which the shipment was addressed, and there was also a station in the eastern part of the State named "Woodley's" to which the shipment was forwarded and where it remained until too late in the season to be used, it is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence, though the defendant was the delivering carrier and had not seen the bill of lading giving more specific designation of the shipment's destination, and the defendant had changed the name thereof, it appearing that the defendant had continued to recognize the former name of the station and had continued to transport freight there when so marked. *Gatlin v. R. R.*, 433.

8. *Same—Evidence—Presumptive Notice.*—Upon evidence tending to show that a railroad company had caused damage to the consignee's tobacco crop by its negligent delay in forwarding a shipment of nitrate of soda to its proper destination, it will be presumed, under the circumstances of this case, that the carrier knew the shipment was intended to be used as fertilizer on his lands to aid in its better cultivation, and he may accordingly recover his proper damages. *Ibid.*

9. *Carriers of Goods—Connecting Lines of Carriage—Misrouting—Delays—Negligence—Conversion—Acceptance of Goods—Damages—Railroads.*—Where an initial carrier has accepted a shipment for a designated routing to the shipper's address, and by reason thereof the shipper did not find them at the designated terminal or otherwise within several months, and then orders them returned to the initial point of shipment where he afterwards accepted them, this acceptance, however long or inexcusable the carrier's delay, precludes the idea of a conversion by the carrier, and its responsibility for the full

CARRIERS OF GOODS—*Continued.*

value of the goods, and the shipper may only recover damages caused by the misrouting, including those caused by the reshipment, and the damages to the goods by the defendant's wrongful conduct. *Harrill v. R. R.*, 540.

10. *Carriers of Goods—Commerce—Federal Employer's Liability Act—Federal Decisions—Procedure—Employer and Employee—Master and Servant—Railroads.*—In an action against a common carrier by rail brought in the courts of the State under the Federal Employer's Liability Act, the question of substantive liability must be determined according to the provisions of the Federal statute when applicable and authoritative Federal decisions construing the same, and the State regulations and rulings as to procedure will control except where the Federal statute makes provision to the contrary. *Lamb v. R. R.*, 619.

11. *Carriers of Goods—Employer and Employee—Master and Servant—Negligence—Dangerous Employment—Freight Trains—Railroads.*—In both Federal and State jurisdictions, railroad companies in the operation of their freight trains are held to a high standard of care reasonably commensurate with the risks and dangers attendant upon the work, and although negligence may not be inferred from the ordinary jolts and jars incident to their operation, it may be imputed from a sudden, unusual and unnecessary stopping of such trains, that are likely to and do result in serious and substantial injuries to employees or passengers thereon. *Ibid.*

CARRIERS OF PASSENGERS. See Statutes, 2; Corporation Commission, 1.

CATTLE. See Contracts, 4; Railroads, 3.

CENTRAL COMMISSION. See Highways, 2.

CERTIORARI. See Appeal and Error, 8, 27, 29.

CHARACTER. See Witnesses, 2.

CHARTER. See Eminent Domain, 1; Courts, 1; Corporations, 2.

CHILDREN. See Deeds and Conveyances, 4; Wills, 8; Courts, 13, 17.

CHILD-BIRTH. See Torts, 2, 3.

CITIES AND TOWNS. See Health, 1, 2, 3; Dedication, 1; Liens, 1; Statutes, 2; Parties, 3; Municipal Corporations, 1, 3, 4, 5, 6, 7, 8, 9, 10; Elections, 2; Constitutional Law, 4, 5; Evidence, 30.

1. *Cities and Towns—Contracts—Water—Sewerage—Streets—Sidewalks—Evidence—Questions for Jury—Nonsuit—Trials.*—A city entered into a contract authorized by ordinance, with the owner of lands, surveyed into lots and to be thus sold at public outcry, that in consideration of the cities receiving certain of these lots for a public use, and the right of way over other of the lands for a street extension, and for laying sewer and water connection, and also for a monetary consideration, it would extend its sewer and water mains, for the use of the purchasers of the lots proposed to be sold, and having acquired the lot and the land for street purposes, the city failed to put in the sewer and water mains, though repeatedly urged by the owner, until after the contemplated sale. In an action by the owner for damages

CITIES AND TOWNS—*Continued.*

against the city for breach of the contract upon the ground that the lots would have brought a greater price with the improvements: *Held*, evidence of this character was sufficient and a motion for judgment as of nonsuit was properly denied. *Lambeth v. Thomasville*, 452.

2. *Same—Damages.*—Where there is evidence that by a breach of its contract to put in water and sewer main connection for the benefit of purchasers of lands laid off and to be sold into lots, a city had caused damage to the owner by the failure of the lots to bring the prices they would otherwise have brought, the amount of damages recoverable, upon competent evidence, is the difference between the market value of the land without the water main and sewer connection and what would have been the actual market value at the time of the sale, with the water and sewer connections, and does not fall within the rule that speculative profits are not recoverable. *Ibid.*

3. *Same—Opinion Evidence—Approximate Loss.*—Where the plaintiff may recover as damages to land for breach by defendants of its contract, the difference between the market values affected by the breach, such values may be proven by opinion evidence of witnesses properly qualified to speak from experience and observation, with reasonable certainty, though the plaintiff can give his loss only approximately. *Ibid.*

CITIES.

Cities—Counterclaims—Second Action—Different Counties—Cause Pending—Pleas in Bar—Removal of Cause—Transfer of Causes—Different Causes—Torts—Contracts—Principal and Surety—Bills and Notes.—The surety on a note brought action against the payee thereof for his discharge from liability upon allegation of an extension of time, for a consideration, given by defendant to the makers, without his consent, payment, in full, by the maker, etc.; and, thereafter, the payee brought suit, in another county, to recover upon a written contract whereby the surety agreed to pay the note, if the principal maker did not do so after judgment obtained thereon against him: *Held*, it was optional with the payee to set up the written agreement with the surety, as a counterclaim, in the first action, or to withhold it and bring an independent action thereon, and the pendency of the first action was not in bar of a recovery in the second, or justify the granting of a motion either to dismiss it or transfer it to the venue of the first action. *Allen v. Salley*, at this term, where both actions were founded upon the same tort, cited and distinguished. *Trust Co. v. McKinne*, 328.

CLAIM AND DELIVERY. See Taxation, 1; Contracts, 4.

CLERKS OF COURT. See Removal of Causes, 1, 4; Public Sale, 1; Superior Court, 1.

CODICILS. See Wills, 6.

COLLUSION. See Husband and Wife, 7.

COLOR OF TITLE. See Limitation of Actions, 1, 2; Tenants in Common, 6.

COMMERCE. See Carriers of Goods, 10; Employer and Employee, 11; Railroads, 15.

COMMISSIONS. See Principal and Agent, 1, 2; Corporations, 15; Highways, 1.

COMMON LAW. See Lessor and Lessee, 2; Statutes, 6; Landlord and Tenant, 2; Conspiracy, 1; Courts, 17.

COMPETITORS. See Corporations, 1.

COMPROMISE. See Vendor and Purchaser, 3.

CONDEMNATION. See Counties, 3.

CONSENT. See Judgments, 3.

CONSIDERATION. See Contracts, 5, 8, 10; Tenants in Common, 2; Arbitration, 1; Actions, 3; Pleadings, 6; Fraud, 2, 3; Contracts to Convey, 1; Bills and Notes, 3; Landlord and Tenant, 5.

CONSIGNOR. See Carriers of Goods, 2, 3.

CONSOLIDATION. See Actions, 7; Corporations, 10, 19.

CONSPIRACY.

1. *Conspiracy—Homicide—Evidence—Common Law—Circumstantial Evidence.*—A conspiracy among several, resulting in a murder in the first degree may be shown by circumstantial evidence, or implied from the words and conduct of the parties or the previous facts and circumstances leading up to the killing, making all equally guilty with the one committing the act, and it is not necessary that the parties entered at the same time therein or had expressly agreed thereon. *S. v. Connor*, 752.

2. *Same — Arrest — Murder — Trials — Questions for Jury.*— Where two brothers knew that the sheriff was present to arrest one of them for a criminal offense and before the act both had declared themselves armed with pistols and that the arrest should not be made, and at the time of the attempted arrest the sheriff showed his warrant and was fired upon by the one named therein and the other, knowing the circumstances pressed forward through the by-standers with threatening words and drawn pistol and deliberately fired upon and killed the sheriff: *Held*, the evidence is sufficient of a conspiracy, or the previous meeting of the minds of the prisoners in a common design to kill, and proper for the determination of the jury upon the question of murder in the first degree. *Ibid.*

3. *Conspiracy—Criminal Law—Trials—Questions of Law—Questions of Fact—Instructions—Homicide—Murder—Declarations.*—In an action for conspiracy resulting in a homicide, it is for the court to determine whether the conspiracy has been sufficiently shown for the evidence to be considered by the jury, but when it is, it is correct for the judge to instruct them that if they so found, the act done by one of them in furthering the unlawful design, is the act of all, and declarations made by one, at the time, is to be considered against all. *Ibid.*

4. *Conspiracy— Criminal Law— Arrest— Degrees of Murder— Intent— Statutes—Instructions.*—There being evidence of conspiracy on a trial for a homicide that the defendants, being brothers, R. and S., had

CONSPIRACY—*Continued.*

armed themselves with pistols for the declared purpose of preventing the arrest of one of them, S., under a warrant, by the sheriff, with threats to kill; that the one to be arrested, S., fired upon the sheriff, but the sheriff, slightly wounded, shot him in return, and the other, R., hearing the shot, pressed forward through the by-standers, who tried to detain him, declaring he would kill the man who shot his brother, and fired into the sheriff from behind and killed him: *Held*, a charge was correct that, as to defendant R., the jury could render a verdict either of guilty of murder in the first or second degree or not guilty; and as to S., guilty of murder either in the first or second degree, or guilty of an assault with deadly weapon with intent to kill (Acts of 1919); and as to both defendants, that if they entered into a conspiracy merely for the purpose of resisting an officer, but not with the intent to kill, they would be guilty of murder in the second degree. *Ibid.*

CONSTITUTION, STATE.

ART.

II, sec. 2. The object of punishment is also to prevent crime, and with certain restrictions the Legislature may validly enact statutes relating to question of crimes and its punishment. *S. v. Burnett*, 735.

II, sec. 22. Prohibits courts from trying rights of parties in contests for seats in the Legislature. *S. v. Pharr*, 699.

IV, sec. 27. Deprives Legislature of power to confer on justice's courts jurisdiction to enforce liens on land in drainage districts. *Comrs. v. Sparks*, 581.

CONSTITUTIONAL LAW. See Statutes, 2; Counties, 2; Taxation, 10; Eminent Domain, 1; Courts, 13, 16; Health, 1, 3.

1. *Constitutional Law—Taxation—Corporations—Foreign Corporations—Domestic Corporations.*—Ch. 23, sec. 4, Laws of 1917, being the Machinery Act, relieving the shareholders in foreign and domestic corporations from paying tax on their shares therein when, in case of domestic corporations, the corporation itself pays this tax on its capital stock, and in case of foreign corporations, when two-thirds of the value of their property is situated in North Carolina, and they pay a certain franchise tax, etc., is within the constitutional powers conferred on the Legislature, and is a valid enactment. *Brown v. Jackson*, 363.

2. *Constitutional Law—Courts—Jurisdiction—Actions—Justices of the Peace—Proceedings in Rem—Appeal—Superior Court.*—Art. IV, sec. 27, of our State Constitution, by limiting the jurisdiction of justices of the peace to the sum of two hundred dollars in civil actions founded on contract, and in other civil actions to fifty dollars, value of property, deprives the Legislature of the authority to confer on justices' courts jurisdiction in actions to enforce a lien upon lands for assessment for benefits to the lands in a drainage district, such proceedings being against the land alone as the debtor, and there being no contractual relations between the owner and the drainage district formed under the statute, ch. 96, Public Laws of 1909; and the justice's court being excluded from exercising jurisdiction of this subject-matter, none can be acquired thereof by the Superior Court on appeal therefrom. *Comrs. v. Sparks*, 582.

CONSTITUTIONAL LAW—*Continued.*

3. *Constitutional Law—Quo Warranto—Statutes—Legislative Powers—Courts—Title—General Assembly.*—The Constitution of our State withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly (Art. II, sec. 22), and an action of *quo warranto* will not lie under our statute. Rev., 827, 828 (Consolidated Statutes, secs. 473, 474). *S. v. Pharr*, 699.

4. *Constitutional Law—Discrimination—Taxation—Ordinances—Municipal Corporations—Cities and Towns.*—A town ordinance requiring a license tax from those selling merchandise at auction within the town limits, whether conducted within or without a building is not rendered discriminatory by the violator thereof being the only one in the town engaged in the business, or by a provision excepting a person thus selling his own goods, not more than one day in six months. *S. v. Razook*, 708.

5. *Constitutional Law—Taxation—License Tax—Prohibition—To Business—Municipal Corporations—Cities and Towns—Ordinances—Evidence—Questions for Jury.*—While a town ordinance imposing a tax upon one conducting a business of auctioneering within its limits may not place the tax so unreasonably high as to prohibit a lawful business, the statement of the amount of the penalty alone may not ordinarily be sufficient to prove its invalidity as a matter of law, and it is *Held*, under the circumstances of this case, it would have been a question of fact for the jury had the defendant relied thereon as a defense and presented his evidence; and *semble*, the court gave the defendant the benefit of setting up a *bona fide* belief in defense of the action, by suspending judgment and imposing a small fine, etc. *Ibid.*

CONTINGENCIES. See Estates, 1, 2, 3, 4, 5, 6, 7, 10; Wills, 5; Superior Courts, 1.

CONTENTIONS. See Appeal and Error, 25.

CONTRACTS. See Cities, 1; Insurance, Life, 1, 3; Contracts to Convey, 1; Vendor and Purchaser, 1, 2, 3; Attorney and Client, 1; Statutes, 2, 7, 8; Corporation Commission, 1; Usury, 1; Tenants in Common, 1; Insurance, 1, 2, 4; Drainage Districts, 6; Issues, 2, 5; Deeds and Conveyances, 9; Husband and Wife, 9; Landlord and Tenant, 3; Cities and Towns, 1; Pleadings, 13, 14; Torts, 1.

1. *Contracts—Written Instruments—Parol Evidence—Merger.*—All the various steps of a negotiation merge into the written contract, when executed, which precludes parol evidence as to what the intention of the parties may have theretofore been when at variance with the terms of the written instrument. *Patton v. Lumber Co.*, 103.

2. *Same—Timber—Lumber—Place of Delivery.*—Parties entered into a written contract for the cutting of timber and manufacturing it into lumber, for which the plaintiff was to pay the defendant contractor a certain price when delivered and piled on yards to be provided by the defendant at a certain station without further specifications, which the defendant provided. The plaintiff was allowed to show that it was contemplated by the parties before and at the time the writing was executed that he could acquire a certain tramroad for the purpose of delivering the lumber, and that the defendant had

CONTRACTS—*Continued.*

breached the contract by failing to provide yards for piling the lumber accessible or available therefor at the terminus of this tramroad, at the stated designation: *Held*, evidence of such contentions was of a variance, by parol, of the written instrument, and its admission was reversible error. *Ibid.*

3. *Contracts— Options— Parol Agreements— Written Contracts — Option Price—Damages—Evidence.*—Where the plaintiff has agreed by parol to give the defendant an option on his mica mine for a certain sum, with privilege of examination, and has twice offered a written option, which were promptly declined as not conforming to the agreement, and the parties have then agreed to let the matter rest until the defendant should visit plaintiff's town, which he afterwards did, but did not then see the plaintiff or examine his mine: *Held*, the minds of the parties had not come to an agreement as to the option, and the mere fact that the defendant retained one of the written options tendered him not amounting to a waiver of his rights, the plaintiff cannot recover the price of the option, the subject of his action. *Keener v. Diffenderfer*, 135.

4. *Contracts— Breach— Claim and Delivery— Replevin— Damages—Statutes—Cattle.*—Where the defendant has breached his contract of warranty of horses which he had traded for the plaintiff's mules, and thereupon the plaintiff had taken the horses home and kept them, the upkeep of the horses about equaling the benefit the plaintiff derived therefrom; and in plaintiff's action to recover possession with ancillary remedy of claim and delivery, the defendant kept and sold the mules under a replevy bond: *Held*, there being no allegation in the complaint except for the detention of the mules, the measure of damages for the plaintiff is the difference between the ascertained value of the mules and horses, and interest thereon. Rev., 795. *Burger v. Cooper*, 140.

5. *Contracts— Options— Tender— Full Consideration — Equity — Specific Performance.*—A grantee of an option of lands is required to aver and prove performance on his part as required by his contract, and where he has duly tendered the money consideration within the specified time, and as a part of the consideration for the contract, he is also required to erect a redrying plant upon the lands, in order to maintain his suit for specific performance, he must not only show his readiness, willingness, and ability at any time to make good his tender of the money refused, but also to erect a redrying plant according to his agreement. *Hudson v. Cozart*, 247.

6. *Contracts—Options—Performance in Part—Specific Performance—Equity.*—A contract for the purchase of land indivisible in its nature, and to be performed in its entirety, may not be specifically enforced partially, or as to its separate provisions. *Ibid.*

7. *Same—Actions—Several Sellers—Dismissed as to Some—Appeal and Error—Objections and Exceptions.*—Where a contract to purchase is for the whole of the lands of several tenants in common, specific performance will not be decreed against them when the action has been dismissed as to some of them without exception or appeal by the plaintiffs. *Ibid.*

CONTRACTS—*Continued.*

8. *Contracts— Options— Tender in Part—Waiver—Consideration.*—Where an option, which has become a bilateral agreement to purchase land, is given upon consideration of a certain sum of money, and the erection by the purchaser of a redrying plant by a certain time, the time granted is for the benefit of the purchaser, which the seller may waive without affecting his rights to receive the full consideration. *Ibid.*

9. *Contracts—Specific Performance—Vendor and Purchaser—Title—Bona Fide Pudchaser—Equity—Deeds and Conveyances.*—While equity will not decree specific performance of a contract to convey land when the defendant no longer has any title to convey, the principle only applies when it is clearly established that the title has been passed to a *bona fide* purchaser, free from any and all equities arising to the plaintiff by reason of his claim and the suit brought to enforce it. *Morris v. Basnight*, 298.

10. *Contracts—Lands—Sales—Consideration—Bonds—Face Value—Market Value.*—A contract for the sale of lands "payable one-half in cash and one-half in Liberty Bonds" contemplates the acceptance of the bonds by the purchaser at their face value, and not according to their market value at the time, the latter interpretation having the effect of changing the express terms of the agreement, which the courts may not do in the absence of allegation or proof of fraud or mistake. *Nelson v. Rhem*, 303.

11. *Contracts—Insurance—Policies—Prior Negotiations—Merger—Equity—Corrections.*—All previous negotiations leading up to the execution of the written policy of insurance indemnifying the employer against loss, merge into the contract as written, and upon its acceptance by the assured it is conclusively presumed to contain all the terms of the agreement for insurance by which the parties intended to be bound, unless or until reformed in equity for fraud, mistake, etc. *Guarantee Corporation v. Electric Co.*, 402.

12. *Contracts, Timber— Wills— Devise— Infants—"Moot" Questions—Cutting Period—Extension—Payment—Tender—Guardian and Ward—Testamentary Guardian.*—The owner of lands sold a part thereof, reserving certain timber rights she had sold under a timber contract with privilege to the purchaser of the timber to renew by paying a certain price, and died having devised the other part of the tract, but covered by the timber contract, to her infant nephew for whom she appointed a testamentary guardian. In an action by the purchaser of the timber rights against the grantees of the deceased owner of the lands, and the testamentary guardian, in which the infant devisee personally had not been made a party or a guardian of his estate appointed, and it appears that the purchaser of the timber has cut it after the expiration of the first period, and *Held*, the infant was the owner of the land upon which the timber had been growing, and the question presented as to whether payment or tender had been made in apt time to the testamentary guardian, etc., was a "moot" one, upon which the Supreme Court will not pass. *Lumber Co. v. Valentine*, 423.

13. *Same—Ownership of Land—Actions.*—Where the infant owner has acquired the land by devise subject to a timber contract of the

CONTRACTS—*Continued.*

testator, the period for cutting and removing the timber to be renewed upon the payment by the purchaser of an agreed sum, and the time to renew the period for cutting, etc., has occurred after the testator's death, the question as to whether the infant would be benefited by the renewal does not arise, but the question of payment or tender may only arise in an action in which the infant owner is a party and represented by the guardian of his estate; and where the purchaser of the timber has, notwithstanding, cut and sold the timber and holds the proceeds, the question of whether he committed an actionable wrong is presented. *Ibid.*

14. *Contract—Performance—Reasonable Time—Cities and Towns.*—Where a city has damaged the plaintiff's land by breach of its contract in delaying to put in sewer and water mains, thus causing the plaintiff loss in a public sale of lots therein laid off, and the mayor of the city, during the sale, had stated the city would comply with its contract with which, afterwards, it did comply: *Held*, there being no time limit stated in which the city should do this work, the contract implies that it should be done in a reasonable time, in which should be considered the situation of the parties, the subject-matter of the contract, and all the circumstances attending its performance. *Lambeth v. Thomasville*, 453.

15. *Same—Questions of Law—Instructions—Appeal and Error.*—While the question of reasonable time for the performance of a contract wherein the time therefor is not specified is ordinarily a question of law, in this case it was properly left to the jury under a correct charge, which the jury could not have failed to understand. *Ibid.*

16. *Contracts—Evidence—Leases—Parol Evidence—Landlord and Tenant—Lessor and Lessee.*—Parol evidence of assurances that the lessee would immediately put certain shelving in a store building, the subject of the lease, and afterwards a written lease was executed between the parties, silent as to the time when this should be done, this parol evidence is too indefinite to be allowed contractual effect, and in any event it is controlled by the terms of the written lease that the parties afterwards executed, and is inadmissible. *Miles v. Walker*, 480.

17. *Contracts, Written—Parol Evidence—Merger—Distinct Contracts—Master and Servant—Employer and Employee.*—Where there is evidence that a contractor for the United States Government who was to furnish carpenters, etc., to the Government for its works, induced the plaintiff, through its agent, to sign a written contract with the Government for seventy cents an hour, upon a previous verbal agreement that he should receive eighty-seven and one-half cents per hour, of which the contractor was aware, in the employee's action against the contractor to recover this difference: *Held*, there was evidence to sustain plaintiff's contention, and that the previous parol contract between the plaintiff and defendant was neither contradictory to that signed by the plaintiff with the Government, nor did it merge therein, the two being separate and distinct. *Carrothers v. Stewart*, 693.

CONTRACTS TO CONVEY.

Contracts to Convey—Divisible Contracts—Equity—Specific Performance — Consideration — Fraud — Corporations — Officers — Principal and Agent.—*Semble*, where a corporation is bound by a transaction made by its proper officer with a tenant in common, to purchase the timber growing on the lands at an administrator's sale, to make assets, that it would reconvey a defined portion thereof to the tenant in common, at an agreed price, the mere fact that a third person became a purchaser with the corporation, does not affect the owner's rights, when it is made to appear that the lands were paid for with the corporation's money, was bought in by its officer in fraud of the owner's rights, who thereupon executed a quit-claim deed to his company for a nominal consideration; and *Held*, the contract being a devisable one, performance may be insisted upon by the tenant, he being ready and willing to perform the full obligations of the contract resting on him. *Morris v. Basnight*, 298.

CONTRACTS, WRITTEN. See Evidence, 11.

CONTRIBUTORY NEGLIGENCE. See Negligence, 1, 6; Employer and Employee, 2, 6; Evidence, 2; Railroads, 9, 10; Instructions, 5.

CONTROVERSY WITHOUT ACTION.

1. *Controversy Without Action—Statutes—Affidavits—Actions.*—It is required that the statute permitting the submission of a controversy without action state in the affidavit that "the controversy is real and the proceedings in good faith to determine the rights of the parties," and this statute being strictly construed, the statement that the controversy is genuine and submitted to determine the rights of the parties, is fatally insufficient. *Waters v. Boyd*, 180.

2. *Controversy Without Action—Affidavit—Cause of Action—Parties—Moot Questions—Actions.*—Where the facts agreed in a controversy without action show no cause thereof, an appeal from a judgment thereon will be dismissed in the Supreme Court, as where the plaintiff claims title under a deed, avers that her purchaser was prevented from accepting her deed by the claims of the defendants, without allegation of the facts and circumstances or setting forth sufficiently the terms of the deeds, or making her purchaser and other necessary parties, parties to her action, thus presenting a moot question which the court will not decide. *Ibid.*

3. *Controversy Without Action—Affidavits—Defects—Court—Amendments—Actions.*—The submission of a controversy without action is a consent proceeding, and the court cannot therein direct additional necessary parties, or statements of facts to be made *in invitum*, to cure the defect. *Ibid.*

CONVERSATIONS. See Husband and Wife, 7; Appeal and Error, 33; Homicide, 6.

CONVERSION. See Carriers of Goods, 9.

CORPORATIONS. See Courts, 2; Principal and Agent, 4, 6; Mandamus, 1; Lis Pendens, 1; Monopoly, 4; Dedication, 1; Drainage Districts, 1; Bills and Notes, 2; Contracts to Convey, 1; Constitutional Law, 1; Taxation, 5, 6, 7, 9; Attachment, 3.

CORPORATIONS—*Continued.*

1. *Corporations—Public Service—Competitors.*—Ordinarily a public-service corporation cannot be required to supply its competitor, a public-service corporation, with the material necessary to enable the latter to discharge its duty to the public. *Service Co. v. Power Co.*, 330.

2. *Same—Monopolies—Electricity—Hydroelectric Power—Charter Rights—Election—Courts—Statutes.*—Where the manufacturer of hydroelectric power having a monopoly of the water power over a considerable area in a populous portion of this State, has elected to supply, and has supplied an electric current, under one of its charter powers, to other public-service corporations, for distribution or resale to the private users within a limited territory wherein the manufacturer does not, itself, distribute or resell, the corporations thus purchasing the current are not competitors of the manufacturer, but are a part of the general public, and the manufacturer having elected to supply other public-service corporations for the purpose of resale, may be forced to do so in our courts without discrimination for like service. *Ibid.*

3. *Same—Consumers—Rates—Corporation Commission.*—The users of electricity in a city or town have a direct and vital interest in the wrongful refusal of a hydroelectric public-service corporation from whom they may alone receive their supply, and where the retail corporation is claimed to be charging excessive rates, the matter is within the jurisdiction of the North Carolina Corporation Commission, when brought before it. *Ibid.*

4. *Same—Final Judgment.*—Should it be established by final judgment of court that a public-service corporation having a monopoly of manufacturing hydroelectric power had wrongfully refused to supply its electrical current to distributing or resale public-service corporations, *semble*, the Corporation Commission would have the authority to fix the rate of charges, under the requirements of the court that the manufacturing company must furnish it. *Ibid.*

5. *Corporations—By-Laws—Shareholders—Notice—Independent Transactions.*—The principle by which a shareholder in a corporation is bound by a corporate resolution regularly passed pursuant to its charter and by-laws, prevails only in reference to his status and rights as a shareholder and not where he deals independently with it as one of its customers in the line of business. *Cardwell v. Garrison*, 476.

6. *Corporations—Officers—Transaction—Evidence—References—Courts—Findings.*—The purchasers of land formed a corporation among themselves, to which the land was conveyed at double the price they paid for it, and under reference the evidence tended to show that at the time the individual purchasers *bona fide believed*, upon the opinion of disinterested persons of good character, after due inquiry and inspection of the property, that it was reasonably worth, on the market, the price at which the corporation became the purchaser; and it appeared that there were then no creditors of the corporation. Upon a reference it was found by the referee that the defendants, the individual purchasers of the land, had knowingly and fraudulently overvalued the lands they had conveyed to the corporation, and were liable for their unpaid subscription to its stock, including certain of

CORPORATIONS—*Continued.*

its notes it had given to the incorporators in part payment for the lands: *Held*, there was evidence sufficient to sustain the trial judge in setting aside this finding of the referee, and finding that the defendants believed the price to be a fair and reasonable one, and rendering judgment for defendants; and the exception that the judge had set aside the referee's finding without substituting one in its place, is untenable. *Caldwell v. Robinson*, 518.

7. *Same—Fraud.*—There is no element of fraud in a transaction where the incorporators have *bona fide* sold lands to a corporation formed by themselves, at an advanced price, but at a reasonable valuation, believing it to be such, and there were no creditors of the corporation or other stockholders at the time. The principle that the directors and officers may not take advantage of the creditors of the corporation by their secret or superior knowledge of its affairs, does not apply to the facts of this case. *Ibid.*

8. *Same—Judgments—Estoppel—Liens.*—Where the incorporators have sold to a corporation they have created their lands at an advanced but reasonable price, without fraud or collusion between themselves, and have taken the notes of the corporation in part payment, and later obtained judgments against the corporation thereon, the remedy was by appeal, if the judgments was erroneous, or if irregular by motion to set them aside, or if void, as fraudulent, or for any other reason, by proper proceedings to attack them; but the judgments standing unimpeached are prior liens on the lands within the county where they are docketed, as against the rights of subsequent creditors. *Ibid.*

9. *Corporations — Officers — Transactions — Mortgages — Subrogation — Equity.*—Where the incorporators have *bona fide* sold to a corporation they had formed, and in which they were the only shareholders, their lands at an advanced but reasonable valuation without fraud or collusion, and when the corporation owed no debts, and have personally assumed a mortgage of the corporation on the land, and have paid the same, they are subrogated to rights of the mortgage creditors in the lien under the mortgage. *Ibid.*

10. *Corporations — Absorption — Consolidation — Merger — Continuance in Business—Assets—Debts and Liabilities.*—The principle that a corporation taking over another by reorganization, consolidation, amalgamation, or union is subject to the debts and liabilities of such corporation, rests upon the ground that the corporation so taken over either has not been paid a consideration, or that the transaction was in fraud of its creditors, or upon the presumption of a trust for creditors and does not apply when it *bona fide* and fairly sells only a part of its assets or property to the other corporation and continues to exist and to exercise its functions under its franchise. *McAlister v. Express Co.*, 556.

11. *Same—Sale of Assets—Solvency—Express Companies—American Express Companies—Government Control—Fraud—Principal and Agent—Process—Service.*—An express company conveyed its property, used in transportation, for its appraised value, to the American Express Company, formed at the suggestion of the Director General of Rail-

CORPORATIONS—*Continued.*

ways, etc., under Government control, retaining property of very large value, so that it remained perfectly solvent, and continued to do business under its franchise, and having its own officials and shareholders distinct from those of the new corporation: *Held*, there was therein no such reorganization, reincorporation, merger, or element of fraud or trust as would make the American Express Company liable for the negligence, torts or obligations of the company, whose property it had thus acquired, nor is the case affected by the provisions of the Revisal, sec. 440, requiring foreign corporations to keep a process agent in this State. *Ibid.*

12. *Corporations—Sale of Franchise—Extinction—Debts and Liabilities.*—A merger or consolidation of one corporation with another, so as to render the latter liable for the debts and obligations of the former, without special contract, implies an extinction of the old corporation, and does not apply when it remains solvent and continues to be an actively going concern, under its franchise, and especially when retaining a part of its property of great value. *Ibid.*

13. *Corporations—Sale of Franchise—Statutes—Power to Construct and Operate.*—The franchise of a corporation "to be such" is entirely distinct from its franchise to transact its business. In this case, the Southern Express Company retained its franchise "to be" and "to operate," and also a large part of its property and assets, and the doctrine of merger, or consolidation, does not apply. *Ibid.*

14. *Corporations— Insolvency— Dissolution— Actions—Shareholders—Statutes.*—The statutory provision allowing a shareholder and certain others to maintain his action to dissolve a corporation for nonuser of its powers for two years or more consecutively, Rev., 1196, is not affected by the later statute, ch. 147, Laws 1913, requiring that he should own one-fifth of the stock, or that the corporation has failed to earn certain dividends, etc.; for this applies to going concerns, nor does the principle apply which requires him to first make application to the management to take this course, for this relates to suits concerning corporate management; and the judge having the matter before him in the course and practice of the courts "has jurisdiction of all questions arising in the proceedings to make such orders, injunctions, and decrees therein as justice and equity shall require, at any place in the district." *Lasley v. Mercantile Co.*, 575.

15. *Same—Commissions— Sales— Mortgages— Trust Deeds—Foreclosure—Parties—Stay of Order to Sell.*—Where a commissioner has been appointed by the court to sell the property of an insolvent corporation in a receiver's hands, and it appears that substantially the entire property has been advertised, and is about to be sold by a trustee under a deed of trust constituting a prior lien, the sale of the commissioner of the court will be stayed until the trustee and the lien creditor be made parties, and afforded an opportunity to be heard. *Ibid.*

16. *Corporations— Receivers— Courts— Jurisdiction—Statutes.*—The property of an insolvent corporation in a receiver's hands is *in custodia legis*, and the court having jurisdiction, by virtue of its general equitable powers, and by express provision of our statute, Rev., 1204, may "dispose of all questions arising in the proceedings, and make

CORPORATIONS—*Continued.*

all such orders, injunctions, and decrees therein as justice and equity may require, at any place in the district." *Lasley v. Scales*, 578.

17. *Same—Liens—Mortgages—Deeds in Trust—Estates—Creditors—Equity.* In administering the equities of an insolvent corporation in its receiver's hands among its unsecured creditors and those having liens upon its property by mortgages and otherwise, the court having jurisdiction may take charge of the property affected by such liens, whether by mortgage, or deed of trust, etc., and observing the validity of such liens, may make sale of the property affected by them through its own appointees, in disregard of the minor requirements of the deeds or other instruments, etc., where such course works no substantial impairment of the value of the security and is for the best interest of the owners and others having claim upon the assets. *Ibid.*

18. *Same—Injunction—Restraining Orders—Powers of Sale—Parties.*—A shareholder had a receiver appointed for his insolvent corporation, wherein pleadings had been filed and reference had, to ascertain the status of its indebtedness, and sought to enjoin the sale thereafter to be made of substantially all the insolvent's property by a trustee, under a deed of trust, executed theretofore and constituting a prior lien thereon, with allegations, and denials thereof, that the trustee and others were forming a corporation to purchase the property at a forced sale under the mortgage, to his irreparable injury, etc.: *Held*, the court, having jurisdiction, may disregard the power of sale contained in the mortgage, and observing the priorities, order the insolvent's property to be sold for the best interest of lienors and other creditors; and that the remedy by injunction was available, but that the receiver was a proper and necessary party plaintiff to the suit. *Ibid.*

19. *Corporations — Receivers — Parties — Shareholders — Consolidation of Suits—Actions.*—Where a receiver has been appointed, by a court having jurisdiction, of an insolvent corporation, at the suit of one of its shareholders, an injunction to prevent a sale under the power of a prior mortgage, to preserve its assets, etc., should be applied for by motion in the cause, and not by an independent suit by the shareholders; and where he has not been appointed at the time of the commencement of the shareholder's suit, this should be consolidated with the principal case, so that the court, having all parties before it in the same suit, will be enabled to make an authoritative and final disposition of the same. *Ibid.*

CORPORATION COMMISSION. See Statutes, 3; Corporations, 3.

Corporation Commission—Railroads—Street Railways—Passengers—Rates—Municipalities—Contracts—Parties—Appeal and Error—Carriers of Passengers.—It is the duty and assuming the right of a municipality granting its charter to a corporation to operate a street car system therein (Rev., 2916, subsec. 6), and which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon petition filed by the railway company before the corporation commission requesting that it be permitted to raise the fares beyond those limited in the contract, and the municipality may appeal through the courts as the statute prescribes, when the order is adverse to it or the interest it represents.

CORPORATION COMMISSION—*Continued.*

as a "party affected by the decision and determination of the commission," expressly provided for by the statute. *In re Utilities Co.*, 152.

CORRECTIONS. See Contracts, 11.

CORRESPONDENCE. See Husband and Wife, 7.

COSTS. See Appeal and Error, 5, 20; Estates, 9.

1. *Costs—Appeal and Error—Record—Rules of Court.*—Where a party to an action in the settlement of a case on appeal insists that the entire charge of the trial judge should be sent up on appeal as a part of the record, and this has been uselessly done over the objection of the opposing party, being unnecessary to the proper presentation of the matters of law involved, the motion of the letter, upon notice, to retax the cost for the full amount of the printed record, will be sustained. Attention of the profession is called to the Rules of the Supreme Court as to sending up unnecessary matter in the record to the useless costs to litigants and the inconvenience of the Court. See Rules of Court, 31, 32, 22 and 19. *Lumber Co. v. Privette*, 1.
2. *Costs—Personal Expenses—Judgments.*—A successful litigant is not generally entitled to his personal expenses incurred in prosecuting his action. *Grain Co. v. Feed Co.*, 654.

COUNSEL. See Appeal and Error, 14.

COUNTERCLAIM. See Actions, 2; Pleadings, 10.

COUNTIES. See Taxation, 2, 10; Appeal and Error, 11; Cities, 1.

1. *Counties— Road Commissioners— Roads— Highways—Condemnation—Damages—Location of Road—Discretion.*—Where a part of the owner's lands has been taken by the county in straightening a highway, and he is left with the use of the old road running near his dwelling on another part of his land, he is not entitled to having considered by the jury, in estimating his damages, the fact that the new road did not run by his dwelling, the location of the new part of the road being a matter entirely within the discretion of the proper county authorities. *Elks v. Comrs.*, 241.
2. *Same—Diminution of Damages—Evidence—General Benfits—Statutes—Constitutional Law.*—The usual rule that in arriving at the damages to lands of the owner in taking them for a *quasi*-public use, as relating to railroads and the like, only special benefits may be considered in diminution does not always apply, especially to counties and cities as to streets, public roads, and highways, for it is within the discretion of the Legislature to allow in all or in case, as a deduction not only those benefits special to the lands so taken, but also those general to the lands in that vicinity, and a statute allowing the consideration of such general benefits is constitutional and valid. Sec. 8, ch. 714, Laws 1905. *Ibid.*

COURTS. See Criminal Law, 1, 5; Judgments, 3; Attachment, 1; Mandamus, 1; Issues, 1; Monopoly, 1; Jurors, 1; Parties, 1; Slander, 1; Pleadings, 3; Removal of Causes, 2; Corporations, 2, 6, 16; Public Sales, 1; Estates, 10; Taxation, 8; Health, 2; Reference, 1; Evidence, 8; Constitutional Law, 2; Drainage Districts, 6; Appeal and Error, 30, 31; Witnesses, 1.

COURTS—*Continued.*

1. *Courts—Jurisdiction—Corporations—Public Service—Charter Powers—Other Public-service Corporations—Electricity—Hydroelectric Companies.*—Where a public-service corporation engages in a class of business authorized by its charter, it dedicates its property to that particular class of use, and where a hydroelectric company having a monopoly has been authorized by its charter to sell to other electric companies, etc., power, etc., for retail or distribution among customers, it may not resist the jurisdiction of our courts upon the ground that they were not legally required to do so, though the distributing or retail company is in some sense a competitor, and has the charter right to generate or manufacture its own electricity. *Public Service Co. v. Power Co.*, 17.

2. *Courts—Jurisdiction—Actions—Transitory Causes—Nonresidents—Process—Summons.*—An action to recover damages for an injury negligently inflicted is for a transitory cause following the person of the party injured, and he, though a nonresident, may maintain it in the courts of our State upon a cause of action arising in another State, irrespective of the nonresidence here of any or all of the parties, or whether the defendant be a corporation, or the place where the injury was inflicted, if valid service of summons can be herein made. *Ledford v. Tel. Co.*, 63.

3. *Courts—Jurisdiction—Transitory Cause—Statutes—Other States—Interpretations.*—Our statute, Rev., 423, providing that actions against foreign corporations may be brought in any county wherein the cause of action arose or in which the corporation usually does business, or in which it has property, or in which the plaintiff, etc., resides, under certain restrictions, is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; and under our own decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of our courts of transitory causes of actions. *Ibid.*

4. *Courts—Equity—Actions at Law—Jurisdiction—Injunctions—Judgments—Bills of Peace—Multiplicity of Suits.*—In this State, wherein the difference between actions at law and suits in equity has been abolished, equitable relief may be enforced in an action in which the remedy at law has been sought; and, in proper instances, an injunction, as if in a suit in the nature of a bill of peace, may be decreed by the court to prevent vexatious litigation, or further action, upon a cause in which the party has theretofore been estopped by final judgment. *Moore v. Harkins*, 167.

5. *Courts—Justice's Courts—Pleadings—Statutes—Amendments.*—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," Rev., 1463, and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the court to amend either in substance or form, at any time before or after judgment in furtherance of justice. Rev., 1467. *Aman v. R. R.*, 310.

COURTS—*Continued.*

6. *Courts—Evidence—Weight and Credibility—Verdicts Set Aside—Discretion—Appeal and Error.*—The weight and credibility of competent and conflicting evidence is for the determination of the jury. It is within the discretion of the trial judge to set aside a verdict on the ground that it is against the weight of the evidence, and his action thereon is not reviewable. The jury in this case was not bound to find for the defendants, however strong and convincing their evidence may have been. If the verdict was contrary to the weight of the evidence the defendant's remedy was by motion to set aside the verdict as indicated above. *Harris v. Turner*, 323.

7. *Courts—Verdict Set Aside—Evidence—Matters of Law—Appeal and Error—Objections and Exceptions—New Trials—Judgments.*—Where the judge erroneously overrules as a matter of law his previous ruling upon the admission of evidence, as the basis for setting the verdict aside, the order vacating the verdict will be set aside on appeal, with direction that judgment be entered on the verdict, and when so entered the appellant may then have the right of appeal and present his exceptions taken on the trial. *Bank v. Stack*, 515.

8. *Courts—Jurisdiction—Justices of the Peace—Appeal—Superior Courts.* An appeal to the Superior Court from a justice of the peace confers only derivative jurisdiction on the Superior Court, depending entirely upon that of the justice's court from which the action was appealed, and in the absence thereof the Superior Court can acquire none. *Comrs. v. Sparks*, 581.

9. *Courts—Terms—Expiration—Consent of Parties—Continuance of Term.* The term of the court expires when the judge finally leaves the bench whether the statutory time has expired or not, and motions to set aside the verdict of a jury or other like action in the case cannot be entertained at the next term, except by consent of the parties. *Cogburn v. Henson*, 631.

10. *Same—Reservation of Rights of Parties.*—An agreement by the parties to an action, the last case on trial at the expiration of the term, that "the judgment may be signed out of term and out of the county" in effect continues the term in so far as it affects the particular matter, but reserves the right to each party to have the judge exercise the discretionary powers over the verdict, invested in him by law, and his action in setting the verdict aside in his discretion, at the next subsequent term of the court, is within the purview of the agreement, and valid. This custom is discouraged by the Court as a bad one, and one that should be discontinued. *Ibid.*

11. *Same—Signing Judgments—Ministerial Acts.*—The mere signing of the judgment, when rendered, is a ministerial act which requires no agreement of the parties for it to be done after term. *Ibid.*

12. *Courts—Sister States—Decisions—Master and Servant—Employer and Employee—Safe Place to Work.*—The courts of this State and of Virginia are in harmony upon the principle of the nondelegable duty of the employer to provide a reasonably safe place for the employees to work in the observance of due or reasonable care, and this principle will be applied on the trial here, when the cause of action arose there. *Whittington v. Iron Co.*, 647.

COURTS—*Continued.*

13. *Courts—Juvenile Courts—Delinquent Children—Guardian and Ward—Constitutional Law.*—Chapter 97, Laws of 1919, entitled "An act to establish Juvenile Courts" is designed and intended to take over in behalf of the State, the guardianship of delinquent and dependent children under sixteen years of age, specified and described in the statute where it is clearly established that the care and control of the parents or others having present charge of such children is inadequate and harmful, and the welfare of the child and the best interest of the State clearly requires it, and the same is held to be a constitutional and valid enactment. *S. v. Burnett*, 735.

14. *Same—Statutes—Interpretation.*—Under said statute and in case of children under the age of sixteen years charged with being delinquent by reason of the violation of the criminal laws of the State, the act provides and intends to provide in effect:

(a) That children under fourteen years of age are no longer indictable as criminals, but must be dealt with as wards of the State, to be cared for, controlled and disciplined with a view to their reformation.

(b) That in case of children between fourteen and sixteen years of age, and as to felonies, whenever the punishment cannot exceed ten years, they may if the instance requires it, be bound over to the Superior Court to be prosecuted under the criminal law appertaining to the charge.

(c) That in case of children from fourteen to sixteen years of age and as to felonies, whenever the punishment is ten years and over they are amenable to prosecution for crime as in case of adults. *Ibid.*

15. *Courts—Juvenile Courts—Jurisdiction—Statutes.*—The exception in our statute creating the juvenile court, ch. 97, Laws of 1919, that a case may not be investigated on the petition of the parent, etc., when the custody of the child is committed to an institution controlled by the State, applies to the action of the juvenile court, and does not limit the Superior Court in its general jurisdiction over matters of law and equity, in making, upon proper application and appropriate writs, inquiry and investigation into the status and condition of children disposed of under the statute, or in rendering such orders and decrees therein as the rights and justice of the case or the welfare of the child may require. *Ibid.*

16. *Courts—Juvenile Courts—Crimes—Constitutional Law—Statutes.*—Our Constitution established the only punishment for crimes recognized by the law of this State, and states, Art. II, sec. 2, that the object of punishment is not only to satisfy justice but to reform the offender, and thus prevent murder, arson, burglary and rape, and those punishable with death if the General Assembly shall so enact, and the fourth section of the Bill of Rights admonishes against cruel and unusual punishment, and it is within the discretionary authority of the Legislature, with these limitations, to pass upon, by proper enactment, the question of crime and its punishment. *Ibid.*

17. *Same—Common Law—Wayward Children.*—Our Constitution, in conferring legislative authority upon the General Assembly, included the legislative powers of the English Parliament or of other governments of a free people, except such as restrained by express constitutional provision or necessary implication therefrom, and there being no

COURTS—*Continued.*

constitutional inhibition, either State or Federal, and delinquent, dependent, and wayward children being regarded in a peculiar sense as within the care and wardship of our State, the powers conferred by our Legislature, ch. 97, Laws of 1919, creating a juvenile court, are constitutional and valid. *Ibid.*

18. *Same—Trial by Jury.*—Ch. 97, Laws of 1919, creating a juvenile court, etc., does not deal with delinquent children as criminals, but as wards of the State, and undertakes to give them the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, and a support and not a hindrance to the commonwealth, and the objection that the statute ignores or unlawfully withholds the right to a trial by jury, cannot be sustained. *Ibid.*

19. *Courts—Juvenile Courts—Parent and Child—Jurisdiction.*—Parents, guardians, etc., must be notified and given an opportunity to be heard in proceeding in the juvenile courts under ch. 97, Laws of 1919, with the right to review in the Superior Court upon adverse judgment; and if the child is taken over by the State, they are allowed, on proper application at any time, to have their child brought before the court, its condition inquired into, and further orders made concerning it except where committed to a State institution and then they may apply directly to the Superior Court, thus giving full consideration to the family relation and parental rights. *Ibid.*

20. *Courts—Juvenile Courts—Parent and Child—Custody of Child.*—The right of parents to the care and custody of their children is not absolute and universal, and may be made to yield when it is clearly established under the provisions of the act to create juvenile courts, ch. 97, Laws of 1919, that the welfare of the child requires it. *Ibid.*

21. *Courts—Juvenile Courts—Crimes and Punishments—Felonies—Capital Offense—Criminal Law.*—The act establishing a juvenile court, ch. 97, Laws of 1919, only operates to extend the conclusive presumption of the age, existing at common law, at which a child is not capable of committing crime, and thereunder a child of ten years of age may not be convicted of committing a capital offense. *Ibid.*

22. *Courts—Juvenile Courts—Statutes—Repealing Statutes.*—Ch. 97, Laws of 1919, establishing a juvenile court, repeals ch. 122, Laws of 1915, and *S. v. Newell*, 172 N. C., p. 933, has no application. *Ibid.*

COURT'S DISCRETION. See Rehearing, 3; Appeal and Error, 21; Indictment, 1.

COVENANT. See Lessor and Lessee, 1, 3.

CREDIT. See Trusts, 4.

CREDITORS. See Corporations, 17.

CRIMES. See Courts, 16; Intoxicating Liquors, 5.

CRIMES AND PUNISHMENTS. See Courts, 21.

CRIMINAL ACTIONS. See Libel and Slander, 4.

CRIMINAL CONVERSATION. See Husband and Wife, 4.

CRIMINAL LAW. See Witnesses, 1; Appeal and Error, 29, 34; Homicide, 1; Conspiracy, 3, 4; Taxation, 13; Courts, 21; Evidence, 31; Municipal Corporations, 8; Rape, 1.

1. *Criminal Law— Mayor's Court— Appeal— Bill— Warrant— Solicitor's Discretion—Courts.*—It is within the discretion of the solicitor to send a bill to the grand jury on appeal from a judgment of the mayor of a town imposing a penalty for the violation of its ordinance, instead of trying the case on the warrant. *S. v. Razook*, 708.

2. *Criminal Law—Homicide—Aiders and Abettors.*—Upon a trial for a homicide, those present who were present aiding and abetting are guilty with the one who actually shot and killed the deceased. *S. v. Bailey*, 726.

3. *Criminal Law— Warrants— Amendments— Vagrancy— Suppression of Prostitution— Statutes— Sentence—Judgments.*—The punishment under the act for the suppression of prostitution, ch. 215, Laws of 1919, exceeds an imprisonment of thirty days or a fine of fifty dollars, and where a prosecution is heard in the Superior Court on a warrant issued by the mayor of a town, and not on appeal from the recorder's court, nor upon indictment found by a grand jury, and an amendment has been allowed in the language of Rev., sec. 3740 (7), defining vagrancy, and limiting the punishment to a fine of fifty dollars or imprisonment for thirty days, a sentence upon conviction, for twelve months cannot be sustained. *S. v. Walker*, 730.

4. *Criminal Law—Warrants—Second Offense.*—Where the statute imposes a greater punishment for a second criminal offense, the first offense must be charged in the warrant, being a portion of the description of the offense charged, for the imposition of the greater sentence. *Ibid.*

5. *Criminal Law—Warrants—Amendments—Reduced to Writing—Court's Discretion—Orders, Self Executing.*—Where a warrant in a criminal action charges the defendant with "being a vagrant," it is within the discretion of the Superior Court judge to allow an amendment specifying the particular act under which it has been issued, in this case, Rev., sec. 3740 (7); and while it is the better practice to reduce the amendment to writing at the time, the order is self executing, and failure to do so does not destroy its legal effect. *Ibid.*

CROSSINGS. See Railroads, 8, 9, 10.

CULVERTS. See Waters, 1.

CUSTODY OF CHILD. See Courts, 20.

CUTTING TELEPHONE WIRES. See Torts, 1.

DAMAGES. See Cities and Towns, 2; Insurance, Life, 4; Insurance, Fire, 1; Appeal and Error, 4, 11; Libel and Slander, 2; Contracts, 3, 4; Railroads, 11, 13, 14, 15; Vendor and Purchaser, 1, 13; Contracts, 1, 2; Drainage Districts, 4, 5; Waters, 1; Actions, 8; Evidence, 6, 14; Trials, 1; Arbitration, 1; Judgments, 12; Negligence, 5; Issues, 1; Husband and Wife, 2, 3, 6, 9; Carriers of Goods, 7, 9; Instructions, 8; Principal and Agent, 9; Landlord and Tenant, 3; Torts, 1, 3; Attorney and Client, 1; Bankruptcy, 1.

DANGEROUS EMPLOYMENT. See Carriers of Goods, 11.

DEADLY WEAPON. See Homicide, 1.

DEATH. See Torts, 2, 3.

DEBTOR AND CREDITOR. See Trusts, 1.

DEBTS AND LIABILITIES. See Corporations, 10, 12.

DECEASED PERSONS. See Boundaries, 1.

DECISIONS. See Statutes, 1; Courts, 12.

DECLARATIONS. See Boundaries, 1; Conspiracy, 3; Evidence, 28; Homicide, 3, 4, 5, 6.

DEDICATION. See Municipal Corporations, 1, 2, 3, 4.

Dedication—Acceptance—Easements—Municipal Corporations—Cities and Towns—Corporations—Officers—Principal and Agent.—Where the president, general manager, and nearly the sole owner of a corporation has gone with the commissioners of a town to see if the corporation will allow the town a part of the corporation's land for the site of a municipal reservoir, and he has orally instructed them to go ahead and use it; that it would be of benefit to the corporation, upon which the commissioners act and construct their reservoir thereon, these acts will amount to a dedication of the land by the corporation, and an acceptance by the town for the purpose of a reservoir, there being no particular form or any writing or length of time necessary for the dedication, and the authority of such officer is implied from his official character and status with the corporation. *Land Co. v. Murphy*, 133.

DEEDS AND CONVEYANCES. See Estates, 2, 3, 4, 5; State's Land, 2; Husband and Wife, 1, 8; Contracts, 9; Instructions, 1; Parties, 2; Wills, 2, 8; Fraud, 1, 3, 4, 5; Ejectment, 1; Trusts, 1, 2, 4, 5; Tenants in Common, 3, 5; Landlord and Tenant, 8.

1. *Deeds and Conveyances—Chain of Title—Incapacity of Grantor—Mental Capacity.*—Where the title to land is involved, any deed in the adversary's chain may be attacked as invalid in law, for lack of capacity in the grantor to make it. *Mobley v. Griffin*, 104 N. C., 112, cited and approved. *Ricks v. Brooks*, 205.

2. *Deeds and Conveyances—"Heirs"—Fee Simple Title.*—A conveyance in trusts, made before 1879, which purports to convey the whole estate and interest of the grantor in lands in trust to the *cestui que trusts*, is of the fee simple title, though there are no words of inheritance associated with the beneficiaries. *Hollowell v. Manly*, 262.

3. *Deeds and Conveyances—Interpretation—Intent—Exception—Rule in Shelley's Case.*—A deed to lands must be construed to effectuate the intention of the parties as expressed in the entire instrument, except when modified by some arbitrary principle of law, like the rule in *Shelley's case*, which, perhaps, is the only exception now prevailing. *Pugh v. Allen*, 307.

4. *Same—"Heirs"—Children—Defeasible Fee—Title.*—A limitation of lands over on the death of the grantee or first taker without heir or

heirs, and the second or ultimate taker is presumably or potentially one of the heirs general of the first, the term "dying without heir or heirs" on the part of the grantee, will be construed to mean, not his heirs general, but in the sense of children and grandchildren, etc., living at his death; and a gift to donor's son J., expressed upon consideration that in case he should die without an heir the gift shall revert to the sole use and benefit of donor's son T., "his heirs and assigns," upon the death of J. without issue, the estate would go to the heirs of T., since deceased, of the blood of the first purchaser, who would take under the deed. *Ibid.*

5. *Same—Repugnant Clauses.*—An estate granted to J. defeasible in effect upon condition that at his death without issue, it would go over to the heirs of his brother T., both being the sons of the donor or grantor, is not repugnant to a latter expression of the writing granting the lands to J. "his heirs and assigns" in fee, in the sense that one is destructive of the other, for the limitation will be held as a qualification of the granting clause, showing the intent of the grantor was not to convey a fee simple absolute, but a defeasible fee in the lands to J. *Ibid.*

6. *Deeds and Conveyances—Description—Identification of Lands—Parol Evidence—Statutes.*—A description of land in a deed, all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Rev., 948, 1605. *Timber Co. v. Yarbrough*, 335.

7. *Deeds and Conveyances—Acknowledgment—Subsequent Probate—Proof—Husband and Wife—Evidence.*—Where the husband joins with his wife in the execution of a deed to her lands, and it is certified that he had assented thereto at that time, the objection to the probate of the husband that it was taken after his wife's death is untenable, for the probate or acknowledgment is not the execution of the deed, but the proof thereof. *Frisbee v. Cole*, 470.

8. *Deeds and Conveyances—Statute of Frauds—Descriptions—Parol Evidence—Specific Performance—Equity—Statutes.*—A written contract to convey the grantor's "entire tract or boundary of land, consisting of 146 acres," sufficiently describes the lands intended to be conveyed to admit of parol evidence tending to show that the owner had only one tract of land of that description in that locality, which was generally known, and upon which he resided, and which he cultivated, to designate the subject-matter of the contract and fit it to the description contained in the instrument, and the contract is sufficient to enforce specific performance by the seller under the statute of frauds, Rev., 976. *Norton v. Smith*, 553.

9. *Deeds and Conveyances—Wills—Contracts—Ambiguity—Statute of Frauds—Parol Evidence.*—The description of land contained in a will which is sufficiently definite to admit of parol evidence to fit thereto the land intended to be conveyed, is also sufficient, in a deed or other

DEEDS AND CONVEYANCES—*Continued.*

written contract; and where there is a description therein of the lands intended to be conveyed, as a certain tract containing a certain acreage, it will not be presumed that the grantor or devisor had more than one tract of that description, and there is no patent ambiguity in the written instrument; and if it is shown that he did have more than one, it is an instance of latent ambiguity, which may be explained by parol evidence to identify the tract intended to be described. *Ibid.*

DEFAULT. See Judgments, 10, 11, 12.

DEFAULT AND ENQUIRY. See Judgments, 8, 12.

DEFECTIVE LOCOMOTIVE. See Railroads, 5.

DEFENDANT. See Jurors, 2.

DEFENSES. See Actions, 1; Mandamus, 4; Intoxicating Liquors, 2; Insurance, Life, 6; Pleadings, 14; Judgments, 15; Homicide, 4.

DEFENSE BOND. See Pleadings, 2.

DELIVERY. See Contracts, 2; Carriers of Goods, 7; Instructions, 8.

DEMURRAGE. See Carriers of Goods, 6.

DEMURRER. See Estates, 6; Pleadings, 1, 6, 12, 15; Actions, 8; Parties, 3; Torts, 2; Evidence, 16, 17.

DEPOSITS. See Usury, 1.

DERAILMENT. See Negligence, 1; Railroads, 2, 3.

DESCENT AND DISTRIBUTION. See Estates, 4; Limitation of Actions, 2.

DESCRIPTION. See Deeds and Conveyances, 6.

DEVISE. See Wills, 3, 4, 8; Contracts, 12.

DIRECTOR GENERAL. See Summons, 5.

DISCRETION. See Counties, 1; Courts, 6; Appeal and Error, 30, 31; Health, 2; Issues, 1.

DISCRIMINATION. See Mandamus, 1; Monopoly, 1, 2; Statutes, 5; Constitutional Law, 4; Health, 3.

DISMISSAL. See Actions, 1.

DISSOLUTION. See Corporations, 14.

DISTRIBUTION OF PREMISES. See Landlord and Tenant, 2.

DITCHES. See Waters, 1.

DIVORCE. See Appeal and Error, 7; Summons, 8, 9.

Divorce—Venue—Jurisdiction—Motions—Removal of Cause.—The provision of Revisal, 1559, that proceedings for divorce shall be returnable to the court of the county in which the applicant resides is not jurisdictional and may be waived, and the failure therein must be taken

DIVORCE—*Continued.*

advantage of by motion to remove the cause to the proper venue, and not to dismiss. *Davis v. Davis*, 185.

DRAINAGE DISTRICTS.

1. *Drainage Districts—Governmental Agencies—Quasi-Public Corporations—Principal and Agent—Negligence—Torts.*—Drainage districts formed under the statute are not regarded as governmental agencies to the extent that they are protected from civil actions except when authorized by statute, but are classed with *quasi*-public corporations and are ordinarily liable for their torts and wrongs, which, in proper instances, extend to their participating officers and agents as a personal liability. *Spencer v. Wills*, 175.

2. *Same—Procedure—Unauthorized Departure.*—The principles that conclude parties to proceedings in the formation of drainage districts under the statute by final judgment, from a recovery of damages to their lands, applies to such as may have accrued in the laying out and the establishment of the district under the procedure prescribed, and does not prevent an injured proprietor, within or without the district, from maintaining his independent action to recover damages caused by an unauthorized and substantial departure from the scheme and plan established by the decrees and orders in the cause, nor where the damage complained of is attributable to the negligence of the company, or its officers or agents in carrying out the proposed work. *Ibid.*

3. *Same—Judgments—Estoppel—Actions.*—In an action against a contractor in cutting canals and doing other work in the establishment of a drainage district under the statute, there was evidence tending to show that the defendant caused damage to plaintiff's land, situated within the district, by the negligent construction of a spillway for the water, not called for in the plans and specifications, from a canal, called for therein: *Held*, the plaintiff, though a party to the proceedings, was not concluded by the final judgment therein, from recovering his damages in an independent action. *Ibid.*

4. *Drainage Districts—Negligence—Torts—Damages.*—A drainage district is liable in damages for wrongs and torts committed on the property of adjoining owners of lands not embraced in the district being established under the provisions of the statute. See *Spencer v. Wills*, at this term. *Sawyer v. Drainage District*, 182.

5. *Same—Final Decree—Outside Lands—Permanent Damages—Election—Judgments—Estoppel—Statutes.*—The whole of plaintiff's lands were originally included in a drainage district to be established under the statutory provisions, but the final judgment so restricted and modified the survey, plat and boundaries as to exclude all except a comparatively small portion of the land, the preliminary survey showing that a canal would go through the land included as well as through the land, or a large part thereof, excluded by the final judgment. There was no evidence that ancillary proceedings for this outside lands by condemnation had been resorted to (ch. 442, sec. 7, Laws of 1909), and *Held*, that the plaintiff, in his independent action, may elect to recover the permanent damages caused to his land. *Ibid.*

6. *Drainage Districts—Statutes—Liens—Actions—Courts—Personal Judgments—Proceedings in Rem—Contracts.*—The lien upon the land of

DRAINAGE DISTRICTS—*Continued.*

the owner in a drainage district when the amount of the assessment has been ascertained in accordance with the provisions of ch. 96, Public Laws of 1909, is by section 4 thereof, upon the lands designated, with right of action in the collector to enforce the lien, by subjecting thereto the land to be benefited or rendered more productive, making the land the debtor, and not the owner thereof, and no personal judgment can be obtained against him, the action being exclusively *in rem*, and not founded on contract. *Comrs. v. Sparks*, 581.

DRUGGIST. See Evidence, 6.

DUES. See Insurance, Life, 7.

"DUE COURSE." See Principal and Agent, 8.

EASEMENTS. See Dedication, 1.

EDUCATION. See Wills, 10.

EJECTMENT.

Ejectment—Land—Titles—Deeds and Conveyances—Evidence—Nonsuit—Statutes.—In an action involving title to lands the plaintiff must recover on the strength of his own title, and he must show title of the State by a grant from the State directly to himself, or connect himself with one by proper deeds or he must show possession and the assertion of ownership, with or without color, for the requisite period, or that the defendant is estopped to deny his title, and where he has not shown any grant from the State or possession in himself or those under whom he claims, or any facts creating an estoppel in his favor, but only a line of deeds beginning in 1895 covering a larger tract of land, and his possession, with assertion of ownership, of a smaller tract included therein, he has failed in his proof, and a judgment as of nonsuit upon the evidence is properly entered against him. Rev., 539. *Moore v. Miller*, 396.

"ELECTION." See Drainage Districts, 5; Corporations, 2; Municipal Corporations, 5, 6, 7; Indictments, 4.

ELECTIONS.

1. *Elections — Notices — Irregularities — Municipalities — Bond Issues.*— Where the election for the issue of bonds by a township for road purposes has been held in all respects in accordance with the provisions of a statute, at the usual polling places, etc., they will not be declared invalid at the instance of a purchaser, on the ground that notice of the new registration ordered had not been advertised for the full twenty-day period stated in Rev., 4305, amended by the Laws of 1913, or that the full period of the thirty-day notice of the time and place of the election had been advertised as set out in Rev., 2967; sec. 47, ch. 56, Consolidated Statutes, Vol. I, when there is no suggestion of fraud and full publicity had been given by newspapers of large local circulation, the election had been broadly discussed beforehand, and it does not appear that any voter is objecting to the bonds or has been deprived of his right to vote. *Comrs. v. Malone*, 10.

ELECTIONS—*Continued.*

2. *Elections— Ballots— Forms— Ordinances— Statutes—Directory Acts— Irregularities—Municipal Corporations—Cities and Towns.*—There being no exact language essential to the validity of a ballot upon which the question of a proposed school bond issue shall be submitted to the voters at a municipal election under a city ordinance, the form of sec. 22, ch. 178, Laws 1919, known as the "Municipal Finance Act," "for the ordinance" or "against the ordinance" is directory and not mandatory, and a ballot with the words "for school bonds" or "against school bonds" is a substantial compliance therewith, and this departure alone will not affect the validity of the bonds issued accordingly. *Comrs. v. Malone*, 605.

3. *Elections—Publishing Returns—Statutes—Irregularities—School Bonds.* Objection to the validity of the election, that the returns for and against an issue of school bonds had not been published as required by sec. 22, ch. 178, Laws 1919, may not be sustained, there being nothing in the act indicating that such publication was essential, it appearing that the books were kept open for the period required by law for registration with full notice to the voters, and no prejudice sustained thereby. *Ibid.*

ELECTRICITY. See Courts, 1; Monopoly, 1, 2; Corporations, 2; Insurance, Accident, 1.

EMINENT DOMAIN.

1. *Eminent Domain—Railroads—Rights of Way—Charters—Public Use—Constitutional Law—Statutes.*—The taking of private lands may only be authorized by statute under the provisions of our Constitution, when for a public use or interest, though full compensation may be provided for the owner. *Bradshaw v. Lumber Co.*, 501.

2. *Same—Purchasers—Private Gain—Ultra Vires.*—Where the constitutional power is given by valid statute to a logging or railroad company to exercise the right of eminent domain, and the corporation has condemned a part of its right of way with the intent to complete it and put it to a public use, it may not transfer this right to a purchasing corporation to which no statutory power was given, and enable the latter to hold and exercise it exclusively for its own private gain or benefit. *Ibid.*

3. *Eminent Domain—Actions—Parties—Railroads.*—The principle that only the State may bring an action to annul the charter of a corporation, has no application to an action for damages by the owner against a railroad company for illegally operating its railroad over his lands, exclusively for private gain and not for the public use or benefit, and to enjoin its continuance. *Ibid.*

4. *Eminent Domain— Railroads— Purchasers — Ultra Vires — Intent.*— Where a railroad corporation is being illegally operated over the lands of the owner by a lumber company for its exclusive private gain, and not for a public use or benefit, the question of intent with which it does so is immaterial and irrelevant. *Ibid.*

5. *Eminent Domain—Railroads—Injunctions—Ultra Vires—Illegal Use.*— The recovery of damages for a trespass is not the exclusive remedy of the owner of lands, in his action against a railroad corporation for illegally and continually operating over his lands for a private

EMINENT DOMAIN—*Continued.*

use, unauthorized by its charter and our Constitution, as an injunction may issue to prevent the continuous adverse user from creating the right to an easement and to avoid a multiplicity of suits. *Ibid.*

EMPLOYER AND EMPLOYEE. See Negligence, 1, 11; Courts, 12; Railroads, 1; Insurance, 2; Insurance, Accident, 1; Carriers of Goods, 10, 11; Contracts, 17; Evidence, 16, 20, 22; Issues, 6.

1. *Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Fellow-servant.*—The duty of the employer to furnish his employee a safe place for the performance of his services cannot be delegated, and where the negligence of the employer in this respect concurs with that of his other employees in proximately causing a personal injury to the plaintiff, the employer may not escape liability on the ground that it was caused by the negligence of the plaintiff's fellow-servants. *Beck v. Tanning Co.*, 123.

2. *Same—Contributory Negligence—Assumption of Risks—Questions for Jury—Trials.*—In this action to recover damages for an alleged negligent injury in the failure of a tannery to provide sufficient lights for the plaintiff, working at night with other employees, filling tubs of boiling water with chipped wood, into one of which, left uncovered, the plaintiff fell to his injury, there was allegation and evidence as to the defendant's failing to furnish sufficient lights and allowing chipped wood to accumulate in the walkway between the tubs: *Held*, sufficient to be submitted to the jury upon the question of defendant's actionable negligence, and that of the plaintiff's contributory negligence or assumption of risks was also properly submitted to them under a charge free from error. *Hicks v. Mfg. Co.*, 130 N. C., 319, and other like cases cited and applied. *Ibid.*

3. *Employer and Employee—Master and Servant—Safe Place to Work—Negligence — Subsequent Repair — Corroborative Evidence.* — Where there is evidence tending to show that an employer has negligently failed to furnish his employee a safe place to work by reason of a certain defect, it is competent to show, by way of corroboration, in certain instances, where the defect is denied, that the place had subsequently been repaired by the employer. *Muse v. Motor Co.*, 175 N. C., 469, cited and applied. *Ibid.*

4. *Employer and Employee—Master and Servant—Safe Place to Work and Approaches.*—An employer of labor, in the exercise of reasonable care, is required to provide for his employee a safe place in which to do his work, this obligation extending to approaches to it where they are under the employer's control and in the reasonable scope of his duties. *Elliott v. Furnace Co.*, 142.

5. *Same—Negligence—Evidence—Injury Reasonably Anticipated—Questions for Jury—Trials.*—Where the owner of mines, operated upon different levels under a mountain, approached from the outside by tracks leading into tunnels, with a main track from which other tracks branched out, and there is evidence tending to show that after the cars, operated upon the various tracks, had been loaded, they were allowed to run down the slopes by gravity; that the employees in changing shifts had been accustomed to use the tracks as a pathway while going to and returning from work, the remaining pathway along the track having fallen into disuse and being dangerous with obstruc-

EMPLOYER AND EMPLOYEE—*Continued.*

tions and pit holes, making the use of the track necessary; that plaintiff, in the course of his employment, had stepped from and back upon the track after allowing several of these cars, running down the slope, to pass, at a place where the light was dim, and was struck and injured by a detached car 15 or 20 feet behind those that had just passed without light or lookout thereon: *Held*, sufficient upon the question of the defendant's actionable negligence, and as a result that would likely follow from the cars running down the track, under the circumstances, where it knew its employees would pass to and from their work. *Ibid.*

6. *Employer and Employee—Master and Servant—Negligence—Contributory Negligence—Railroads—Tramroads—Stepping Upon Track—Look and Listen—Evidence—Questions for Jury—Trials.*—The doctrine that one who has received an injury from passing cars by stepping from a place of safety on to a railroad track, without looking or listening, is guilty of contributory negligence in failing to be properly attentive to his own safety, it is not near so insistent where the injured party is on the track in the line of his duty or by license of the railroad company, and the facts and circumstances may so qualify the obligation as to require the question to be submitted to the jury. *Ibid.*

7. *Same.*—Where there is evidence of the defendant's actionable negligence in permitting an empty car to run down the slope of its mine, to the plaintiff's injury, as he stepped upon the track, customarily used as a walkway by the defendant's employees, after he had stepped aside, where the light was very dim, at four o'clock in the morning, for several other of these cars to pass, some of them coupled together, the car causing the injury closely following, without light or warning given: *Held*, though the plaintiff could have seen this car had he looked back, and remained in safety, this could not be held for contributory negligence, as a matter of law, under the circumstances of this case, and this question was an open one for the jury. *Ibid.*

8. *Employer and Employee—Master and Servant—Duty of Master—Safe Tools—Safe Place to Work—Negligent Orders—Evidence—Questions for Jury.*—The employer's duty is to furnish his employee a reasonably safe place to do the work required under his employment, and reasonably safe tools and implements for that purpose, and not to expose him to unnecessary danger; and where he has been doing his work in a safe way, and changes to an unsafe one under the employer's direct order or that of his vice principal under a reasonable apprehension of discharge, if he refused to obey, and a personal injury is thereby proximately caused, without his own fault, the negligent order is an actionable wrong entitling him to recover damages; and where the evidence is conflicting an issue is raised for the determination of the jury. *Jones v. Taylor*, 293.

9. *Employer and Employee—Master and Servant—Negligence—Assumption of Risks.*—The employer does not assume the risks of defective machinery and appliances due to the employer's negligence, unless the defect is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks. *Ibid.*

10. *Employer and Employee—Master and Servant—Duty to Instruct—Hazardous Employment—Questions for Jury—Matters of Law—Trials.*—

EMPLOYER AND EMPLOYEE—*Continued.*

The right and duty of the master to instruct his servant as to how he should perform dangerous work may involve questions of fact to be decided by the jury, but the right and duty itself, to instruct, in proper cases, exists as a matter of law. *Smith v. Ins. Co.*, 489.

11. *Employer and Employee—Master and Servant—Federal Employer's Liability Act—Commerce—Fellow-servant—Negligence—Railroads.*—The Federal Employer's Liability Act, in suits coming under its provisions, abolishes the fellow-servant doctrine by which an employer is relieved from liability for injuries due solely to the negligence of the fellow-servant, and places such negligence on the same basis as if it had been the negligence of the employer. *Lamb v. R. R.*, 620.

ENDORSERS. See Trusts, 4.

ENTIRETIES. See Husband and Wife, 1.

EQUIPMENT. See School Districts, 1, 2.

EQUITY. See Railroads, 7; Nonsuit, 1; Courts, 4; Contracts, 5, 6, 9, 11; Insurance, Fire, 1; Actions, 3; Fraud, 6; Contracts to Convey, 1; Carriers of Goods, 5; Municipal Corporations, 2; Corporations, 9, 17; Husband and Wife, 9; Pleadings, 10; Deeds and Conveyances, 8; Judgments, 17.

Equity—Subrogation—Superior Equities—Legal Rights.—A party may not invoke the equitable doctrine of subrogation when its application would work injustice to the rights of those having superior equities, or would operate to defeat a legal right. *Green v. Ruffin*, 346.

ESTATES. See Husband and Wife, 1; Wills, 1, 2, 3, 4, 8; Corporations, 17; Superior Courts, 1.

1. *Estates—Contingent Interests—Sales—Release—Pleadings—Judgments—Estoppel—Remainders.*—An estate to testator's two daughters upon condition that if either of them shall die without leaving lawful issue, then to vest in the surviving sister, but if both of them should die without leaving lawful issue, then to certain of the testator's sons, "to be equally divided between them or among their heirs, *per stirpes* and not per capita": *Held*, the sons having released any interest in the property and filed answer consenting to a decree in proceedings to sell the lands and hold the proceeds for contingent interests *in esse*, and others not *in esse*, under the statute: *Held*, the estate of the two daughters is defeasible in the event of both dying without issue, and not indefeasible upon the birth of issue; and in the future event of their both dying without issue, the estate of the sons would be indefeasible, and their heirs would be estopped by their present release and their answer in the case, the words "their heirs *per stirpes* and not *per capita*" indicating only the division of the remainder. *Cherry v. Cherry*, 4.

2. *Estates—Remainders—Contingent Interests—Deeds and Conveyances.* A testator devised lands to his daughter M., and adopted daughter B., the only child of his brother H., for life, then to their children, the issue of any deceased child to take the share its parents would have taken if living; and if either of them should die without child or children, then to the child or children of the survivor of them; but

ESTATES—*Continued.*

should both die without issue, then to H. and his heirs forever. M. had one child who died intestate without issue; B. has two living children, of age and unmarried, the others having died intestate and unmarried; H. is dead, leaving B., his only child, surviving him, and brothers and sisters. B. and her husband and her two children executed a deed to all their interest in the lands to M., now a widow, who executed a deed sufficient in form to the defendant, who refused to comply with his contract to take the land, alleging a defect in the fee-simple title he had purchased. The question as to the possibility of M. and B. having children yet to be born being waived, it is *Held*, M., her husband being dead, inherited the interest of her deceased son, and acquired the interest of B. and her children under their deed; and H., the ulterior contingent remainderman, being dead, and his only heirs have joined in the deed: *Held*, that the interest of all parties were concluded by the deed, and it passed an absolute fee-simple title. *Malloy v. Acheson*, 90.

3. *Estates—Remaindermen—Contingent Interests—Ulterior Devisees—Uncertain Event—Deeds and Conveyances.*—Where an estate is devised upon the contingency of death without issue, and there is also an ulterior devisee designated to take upon the death of the contingent remaindermen without issue, such ulterior devisee being certain, though the event upon which he is to take is uncertain, his estate, though it remains contingent, is transmissible by descent to his heirs, and where there is only one child of such ulterior devisee, a deed made by such child after his death is sufficient to pass his interest in the estate. *Ibid.*

4. *Estates—Remainders—Contingent Interests—Happening of Event—Descent and Distribution—Deeds and Conveyances.*—A devise to the testator's two daughters, M. and B., contingent upon their having issue, M. now a widow, had one son who died unmarried and intestate, and B., her husband, and two children conveyed their interest to M.: *Held*, a fee simple absolute under the deed joined in by all parties in interest was conveyed by the deed, the possibility of M. and B. having children in the future being the only contingency left, and this having been waived by the consent of the parties. *Ibid.*

5. *Estates—Contingent Remainders—Deeds and Conveyances—Wills—Life Estates—Trusts—Naked Estates—Title—Contingencies.*—Upon a conveyance in trust to the sole use and benefit of the wife of H. during her life, and at her death to the surviving children of her marriage with H., and in case she should die leaving no child, "then in that case the property in this deed conveyed shall be held and owned by her husband," H., and H. has died leaving his wife surviving without child of the marriage, and by will has given her "all the property of every description, both real and personal, that he may die possessed of": *Held*, the wife was entitled to an equitable life estate in the lands under the deed; to a contingent interest in fee under her husband's will, Rev., 3140, and the trust having become a passive one, both the legal and equitable title united in her, and her conveyance passed the fee-simple title to the lands. *Holloncell v. Manly*, 262.

6. *Estates—Sales—Contingent Interests—Statutes—Pleadings—Demurrer—Evidence.*—A testator devised his improved and unimproved lands,

ESTATES—*Continued.*

in the corporate limits of a town, to his daughter for life, with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of Rev., 1590, having made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that the sale of the contemplated part to a purchaser she had secured for a certain price would meet the demands of the town for conformity with its certain health regulations as to the removal of surface privies, should enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purposes, etc.; that the property as it stood was rapidly depreciating, and there were no available funds, otherwise, to meet the necessary and insistent demands: *Held*, a demurrer was bad, and properly overruled. *Middleton v. Rigsbee*, 437.

7. *Estates—Sales—Contingent Interests—Trusts.*—Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estates in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. *Ibid.*

8. *Same—Wills—Limitations.*—The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of thirty years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation. *Ibid.*

9. *Estates—Tenants for Life—Maintenance—Remainderman—Costs Apportioned.*—While a tenant for life may be required to make all the ordinary repairs incident to the present enjoyment of his estate and prevent its going to waste, he is not chargeable alone with the costs of permanent improvement which tends to enhance the value of the remainderman's *estate* as well as his own, and such cost should be properly apportioned between them. *Ibid.*

10. *Estates—Contingent Interests—Sales—Auction—Private Negotiations—Court's Discretion.*—The sale of estates affected with contingent interests, made under the provisions of Rev., 1590, may, in the sound discretion of the trial judge, and subject to his approval, be sold either at public auction or by private negotiation, as the best interests of the parties may require. *Ibid.*

ESTOPPEL. See Corporations, 8; Estates, 1; Judgments, 1, 5, 6; Railroads, 7; Drainage Districts, 3, 5; Bills and Notes, 5; Landlord and Tenant, 1; Municipal Corporations, 2.

EVIDENCE. See Appeal and Error, 3, 4, 7, 11, 12, 13, 16, 20, 23, 30, 32, 33; Public Sales, 1; Employer and Employee, 3, 5, 6, 8; Principal and Agent, 1, 10; Instructions, 1, 3, 7, 9, 13; Deeds and Conveyances, 6, 7, 11; Insurance, Life, 3, 6; New Trials, 2; Negligence, 1, 3, 4, 6, 9, 10, 11, 13; Railroads, 1, 2, 4, 6, 9, 10, 13; Contracts, 3, 16; Carriers of Goods, 3, 8; Counties, 2; Boundaries, 1; Bailments, 2; Bills and Notes, 4; Frauds, 2, 3, 4, 5, 7; Courts, 6, 7; Actions, 6; Rape, 1; Waters, 1; Register of Deeds, 1; Nonsuit, 1; Trials, 1; Pleadings, 13, 15, 16; Insurance, 5; State's Land, 2; Estates, 6; Title, 2; Witnesses, 1, 2; Ejectment, 1; Husband and Wife, 3, 7, 8; Libel and Slander, 6; Reference, 1; Corporations, 6; Issues, 4; Landlord and Tenant, 4; Cities and Towns, 1, 3; Municipal Corporations, 9; Libel and Slander, 2; Sunday, 2; Judgment, 15; Vendor and Purchaser, 2, 3; Homicide, 1, 2, 3, 4, 5; Constitutional Law, 5; Intoxicating Liquor, 1, 4, 5.

1. *Evidence—Nonsuit—Trials.*—Where the defendant, in an action to recover damages for a personal injury alleged to have been negligently inflicted, relies for defense upon the plaintiff's contributory negligence, and there is evidence that the defendant's negligence caused the injury alleged, the burden of showing this defense is on the defendant, and a motion as of nonsuit may never be allowed on such issue where the pertinent and controlling facts are in dispute, or where opposing inferences are permissible from plaintiff's proof, or where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense. *Battle v. Cleave*, 113.

2. *Same—Contributory Negligence—Instructions—Verdict Directing.*—Upon evidence showing that the superintendent of defendant railroad company had just brought the defendant's hand car from the defendant's repair shop, and upon its being derailed while he and the plaintiff were riding thereon he stated "they had not adjusted the car properly, and it would have to go back to the shop"; that further on the car again became derailed in like manner, at a trestle, throwing the plaintiff some eight or ten feet to his injury, the superintendent remaining unhurt, and affording evidence of the defendant's actionable negligence: *Held*, the suggestion of the superintendent did not give import of such menace as to constitute contributory negligence on the part of the plaintiff in continuing to ride with him, and operate the car under the circumstances, and the charge to the jury in this case that there was no evidence thereof is sustained. *Ibid.*

3. *Evidence—Irrelevant—Without Prejudice—Appeal and Error—Trials.* The admission of evidence which is neither relevant nor prejudicial to appellant, and which is not responsive to the question, or excepted to, will not be held for reversible error on appeal. *Elks v. Comrs.*, 241.

4. *Evidence—Mail—Presumptions—Rebuttal—Questions for Jury—Trials.* Where notice to the insured of arrears in dues is necessary to work a forfeiture of a policy of life insurance the mailing of such notice properly addressed is presumptive evidence of its delivery, but it is for the jury to determine, upon the evidence, whether this presumption has been rebutted. *Carden v. Sons and Daughters of Liberty*, 400.

5. *Evidence—Nonsuit—Trials.*—Upon a judgment of nonsuit upon the evidence the appellant is entitled to have it considered as true and

EVIDENCE—*Continued.*

construed most favorably for him, giving him the benefit of every inference that may reasonably be drawn therefrom. *Spry v. Kiser*, 417.

6. *Same—Druggists—Negligence—Damages.*—Evidence that a druggist was asked for, and guaranteed that he had given his customer, pure sweet oil, for an infant who had theretofore beneficially been given sweet oil to keep it in a good, healthy condition, and that it was made violently sick, with vomiting and severe bowel trouble, upon taking the usual sized dose of the oil in question; that it recovered somewhat and was again made violently ill at the second dose, which continued until its death about twelve days afterwards; that the oil received from the druggist was rancid, and not sweet oil, and would probably produce the sickness causing the death of the infant: *Held*, sufficient for the determination of the jury as to whether the druggist negligently supplied the rancid oil, and that it caused the death of the infant, in an action against the druggist to recover damages for its wrongful death. *Ibid.*

7. *Evidence—Admission—Title to Lands—Judgments—Appeal and Error.* Where, during the admission of evidence in the course of the trial involving title to several tracts of land, the plaintiff solemnly admits the title in the defendant to one of the tracts, and makes no claim that it was through inadvertence or mistake, or that it was not in accordance with the truth, he will be bound by his admission, and his exception to the judgment upon the ground that the trial judge had not permitted him to withdraw his admission, will not be sustained on appeal. *Turner v. Livestock Co.*, 457.

8. *Evidence—Records—Courts—Burden of Proof—Trials.*—Where a record in a former action is relevant in the present one, the record itself is the only evidence admissible to prove its contents, unless it is shown by the party desiring it, with the burden of proof on him, that it once existed and has been lost, or having existed it cannot be produced. *Gauldin v. Madison*, 461.

9. *Same—Limitation of Actions—Pleadings—Nonsuit.*—Where a judgment by default for the want of an answer has been entered, and a motion to set it aside has been made, and it is necessary for the plaintiff in the present action to recover for a wrongful death, to repel the bar of the statute by showing that the causes of action were the same, and that suit had been commenced within a year, any evidence of what the complaint would have set forth, had it been filed, including affidavits used in the motion to set the former judgment aside, is incompetent. *Ibid.*

10. *Evidence—Former Trial—Parties—Substantive Evidence—Instructions—Corroboration—Impeachment.*—Testimony of a party given on a former trial in contradiction of his evidence of a material fact on the second one, may be received as substantive evidence, and it is reversible error for the trial judge to charge the jury that they could only regard it in corroboration or impeachment. *Miller v. Melton*, 467.

11. *Evidence—Parol Evidence—Contracts, Written—Leases—Landlord and Tenant—Lessor and Lessee.*—The rule excluding parol evidence of a

EVIDENCE—*Continued.*

written paper or document applies only in actions between the parties to the writing and where the enforcement of obligations created by it is substantially the cause of action, and not to collateral matters, though they be relevant to the inquiry; and, when so relevant, parol evidence of a written sublease may be shown in an action upon the lease between the owner of the leased premises and his lessee. *Miles v. Walker*, 480.

12. *Evidence—Surrounding Circumstances—Appeal and Error—Trials.*—While evidence should be rejected upon the trial which merely tends to excite prejudice, or is conjectural or remote, it is not required that it bear directly on the question at issue, and it is competent and relevant if it is one of the circumstances surrounding the parties and necessary to be known to properly understand their conduct and motives, or to weigh the reasonableness of their contentions. *Bank v. Stack*, 514.

13. *Same—Bills and Notes—Negotiable Instruments—Principal and Surety—Mortgages—Release—Conditions.*—There was evidence tending to show that an endorser at the bank of a note did so upon condition that the holder of a mortgage note from the same maker would release the mortgage, so that the note presently given should be a first mortgage on the property, and that the bank knew of this transaction and agreed thereto upon consideration that a certain indebtedness of the mortgagee to the bank be paid with a part of the proceeds of the note, and an officer of the bank testified that the transaction had been made unconditionally, and not conditionally upon the cancellation of the prior mortgage: *Held*, competent for defendant surety to show that the mortgagor was insolvent at the time of the transactions, as bearing materially upon the credibility of the plaintiff bank's contention that it would not have thus surrendered a solvent paper, and the counter proposition that this paper was of no value. *Ibid.*

14. *Evidence—Values—Damages—Disqualification—Appeal and Error—Objections and Exceptions.*—Where exception is made on the trial to the admission of testimony of the value of certain lumber, involved in the issue of damages, and the only witness testifying afterwards states that there were different kinds of lumber with different values: that he had not seen the lumber, and did not know the quality of each kind, but knew its value in comparison with that of other lumber he had sold from the land: *Held*, the exception should have been sustained in the first instance, or the evidence stricken out when the witness's disqualification was shown. *Morrison v. Walker*, 588.

15. *Evidence—Nonsuit—Federal Court.*—Under the rule of procedure, both in the State and Federal Courts, applicable to a motion of involuntary nonsuit upon the evidence, it is considered as equivalent to a demurrer to the evidence, and the facts making in favor of plaintiff's cause of action, whether appearing in plaintiff's or defendant's evidence, must be taken as true and construed in the aspect most favorable to him. *Lamb v. R. R.*, 620.

16. *Evidence—Demurrer—Employer and Employee—Master and Servant—Federal Employer's Liability Act—Railroads.*—In plaintiff's, an employee's, action, brought under the Federal Employer's Liability Act,

EVIDENCE—*Continued.*

for damages for an injury he alleged he had received, and caused by the defendant's negligence, evidence is sufficient for the determination of the jury which tends to show that while the plaintiff was engaged in the scope of his employment in interstate commerce, the freight train, with which his occupation was connected, without warning or signal and without necessity, came from a ten mile speed to an unanticipated and sudden stop and complete stop, causing a violent jolt sufficient to knock plaintiff down, and render him for a time partially unconscious, and causing him serious and painful injuries, and a motion to nonsuit thereon is properly denied. *Ibid.*

17. *Same—Res Ipsa Loquitur—Instructions—Demurrer.*—*Semble,* the Federal decisions applicable in that jurisdiction that the doctrine of *res ipsa loquitur* does not apply in actions between employer and employee will not be followed under the Federal Employer's Liability Act and in cases controlled by its provisions, but, *Held,* its application will not be held for error in such cases where the trial judge merely refers to the doctrine as affording a circumstance which required the issue to be submitted to the jury, no specific objection is made to the charge on that account, and objection is only raised on motion to nonsuit upon the evidence, whereon the occurrence itself, and all the accompanying facts and circumstances offered in evidence which tend to establish the liability, require that they be given consideration. *Ibid.*

18. *Same—Assumption of Risks.*—While the doctrine of assumption of risks in an action by an employee under the Federal Employer's Liability Act, is expressly recognized by the statute, the principle does not apply to the instant and unexpected negligence of the employer under circumstances which afford the employee no opportunity to know the conditions that threaten, or to appreciate the risks. *Ibid.*

19. *Evidence—Mutually Running Accounts.*—Where under an agreement with its depositors as to a line of credit to be extended him, there are almost daily transactions of loans, credits, substituted notes including demand notes on the depositor's collateral, which line of credit was agreed upon from time to time and kept exhausted, the mutual items being so interlocked as to make them practically inseparable: *Held,* such transactions constitute an open mutual running account for the period of time covered by them. See *S. c., ante,* 211. *Lumber Co. v. Trust Co.,* 627.

20. *Evidence—Nonsuit—Federal Employer's Liability Act—Motions—Statutes—Employer and Employee—Master and Servant.*—Under the Federal decisions and those of our State Court, the rule of procedure on a motion to nonsuit upon the evidence, equivalent with us to a demurrer thereon, the facts presented which make in favor of plaintiff's claim must be accepted as true, and interpreted in the light most favorable to him.

Evidence examined and held sufficient to carry the case to the jury on the issue of defendant's liability. *Moore v. R. R.,* 637.

21. *Evidence— Negligence— Conjecture— Circumstantial Evidence.*—While evidence which does no more than raise a conjecture or suspicion of a negligent act alleged is not alone of sufficient probative force to be submitted to the jury, this act may be proved by circumstantial

EVIDENCE—*Continued.*

evidence, and if the facts proved render it probable that the defendant violated its duty, the question is for the jury to decide. *Whittington v. Iron Co.*, 647.

22. *Same—Mines—Master and Servant—Employer and Employee—Proximate Cause.*—Where negligence is relied on in an action against the operator of a coal mine that he had failed in his duty to provide his employee a safe place to work therein, etc., evidence is sufficient for the determination of the jury, that tends to show he had permitted an accumulation of rubbish called "gob," in miner's parlance, along the track in a tunnel whereon the wheels of a coal car ran, driven by a tandem of mules by the employee, so as not to leave enough or the usual space between the sides of the car and the ridge or side of the tunnel, required for the safety of the employee in giving the attention necessary to the performance of his work, and that as a reasonable or probable result therefrom under the conditions, and as the proximate cause, the employee was found dead on the track, under the car, though there was no eye witness to the killing or the immediate circumstances surrounding it. *Ibid.*

23. *Same.*—Upon motion to nonsuit the evidence, the courts will accept as true the plaintiff's evidence, and resolve every reasonable inference in his favor; and where the evidence tends circumstantially to show that an employee to drive a coal car in the tunnel of a mine met his death through the negligent failure of his employer to leave him proper space in the tunnel to perform his work, and this was the proximate cause of his death, for which damages are sought in the action, it is immaterial whether the dangerous conditions existing at the time caused the employee to walk on the outside of the rails in the performance of a duty, and stumbled and fell, or he was forced between the rails by the conditions on the outside, and the death resulted in one way or the other, if the inferences are permissible in either event that it was the proximate cause of the defendant's negligent act, and the defendant would be liable in the absence of contributory negligence on the plaintiff's part. *Ibid.*

24. *Evidence—Written Instruments—Parol Evidence—Collateral Transactions—Principal and Agent—Benefits Accepted—Ratification—Admissions.*—Where a written instrument, a mortgage in this case, is merely collateral to the substantial cause of action and not between the parties, and there is evidence that the defendant received a benefit thereunder and it tends to show his implied admission of liability for the cause of action, his objection to parol evidence to show the transaction on the ground that the written instrument is the best evidence, is untenable, and it makes no difference that it may have been taken in the name of another, if it was really for the benefit of the defendant. *Hall v. Giessell*, 657.

25. *Evidence—Attorney and Client—Argument to Jury—Absence of Client—Appeal and Error.*—The conduct of counsel in presenting their case to the jury is largely in the control and discretion of the trial judge; and in the trial of a civil action, which does not require the presence of a party, the attorney for his side of the controversy may not, as a matter of right, argue to the jury why his client had not been present during the trial, there being no evidence of the fact upon which to base it. *Palmer v. Palmer*, 666.

EVIDENCE—*Continued.*

26. *Evidence—Circumstantial Evidence—Nonsuit—Trials.*— Circumstantial evidence that the defendant negligently set out fire and destroyed the plaintiff's property is sufficient to overrule a judgment as of nonsuit thereon, if of sufficient probative force. *Pigford v. Lumber Co.*, 683.

27. *Evidence—Instructions—Controverted Facts.*—In this action to recover damages for breach of contract of sale of a lot of corn, each party alleging breach thereof by the other, there was no exception of record to evidence, and *Held*, the controversy was one of fact and there was no error in the charge excepted to. *Drake v. Spencer*, 683.

28. *Evidence—Declarations Against Interest—Title—Burden of Proof.*— The declarations of the son of one in the chain of title to lands is not against interest when he had acquired other lands and had moved thereon to live, and was not the only heir at law of his father. *Roe v. Journegan*, 686.

29. *Evidence—Pleadings—Nonsuit—Trials.*—There being no evidence in this case to sustain the plaintiff's allegations of her cause of action, a motion of nonsuit was properly allowed. *Pegram v. Canton*, 700.

30. *Evidence—Nonsuit—Municipal Corporations—Cities and Towns—Ordinances.*—Where it is shown by the defendant's own evidence that he was knowingly engaged in the business of auctioneering in a town without having taken out the license required by a valid ordinance, a judgment as of nonsuit will be refused. *S. v. Razook*, 708.

31. *Evidence—Interested Witness—Criminal Law—Accomplice—Credibility—Instructions.*—An instruction in a criminal case that the jury should carefully and cautiously scrutinize the evidence of an interested witness, and if they should then believe the witness had told the truth to give his testimony just as much weight as that of a disinterested witness, is correct as to such witness, and a requested instruction that the jury must consider the testimony with the other evidence in the case, for it to have the same effect is improper, for such is not required when the jury believes the testimony of the accomplice alone. *S. v. Bailey*, 725.

EXCAVATIONS. See Railroads, 3.

EXCEPTIONS. See Intoxicating Liquors, 2.

EXECUTORS AND ADMINISTRATORS. See Public Sales, 1.

EXECUTION. See Torts, 2, 4.

EXPERTS. See Homicide, 6.

EXPLOSIVES. See Negligence, 13.

EXPRESS COMPANIES. See Corporations, 11.

FEDERAL COURT. See Evidence, 15.

FEDERAL DECISIONS. See Carriers of Goods, 10.

FEDERAL EMPLOYER'S LIABILITY ACT. See Carriers of Goods, 10; Employer and Employee, 11; Evidence, 16, 20; Issues, 6; Negligence, 11.

FEDERAL STATUTES. See Railroads, 15.

FEE. See Judgments, 2.

FELLOW-SERVANT. See Employer and Employee, 1, 11.

FELONIES. See Courts, 21.

FEME COVERT. See Tenants in Common, 3.

FERTILIZER. See Vendor and Purchaser, 1; Carriers of Goods, 7; Instructions, 8.

FINDINGS. See Judgments, 2; Appeal and Error, 9, 20, 23; Judgments Set Aside, 1; Title, 3; Reference, 1; Corporations, 6; Attachment, 3.

FIRES. See Appeal and Error, 4; Railroads, 5, 6, 7, 11, 13, 14; Lessor and Lessee, 2.

FORCE. See Seduction, 1.

FORECLOSURE. See Liens, 15.

FORFEITURE. See Insurance, Life, 6.

FORM. See Issues, 3; Elections, 2.

FRANCHISE. See Corporations, 12, 13.

FRATERNAL ORDERS. See Insurance, Life, 5, 7; Insurance, 5.

FRAUD. See Judgments, 4; New Trials, 2; Actions, 5; Pleadings, 16; Contracts to Convey, 1; Insurance, 5; Trusts, 2; Corporations, 7, 11.

1. *Fraud—Deeds and Conveyances.*—Fraudulent representations made in the procurement of a deed sufficient to set it aside must be untrue in fact, made by the party inducing it with a knowledge of its being false or consciously ignorant thereof with intent that the other party should act thereon, or calculated to induce him to do so, and upon which he acted to his damage. *Bell v. Harrison*, 190.

2. *Same—Evidence—Consideration—Actions.*—Upon evidence that the plaintiff, an heir at law of a deceased person, not knowing he was such, was informed thereof by another heir, and while the corpse was yet in the house represented to him that he, upon investigation, had ascertained that his share was worth about one thousand dollars, offered this amount upon condition of immediate acceptance, cautioning secrecy, and accordingly obtained a deed from the plaintiff and his wife soon thereafter; that the plaintiff was a man below the average business intelligence, relied upon and had great confidence in the defendant, and his statement caused him to accept his offer; that in fact the plaintiff's interest in the estate was worth some four or five times the amount he had received for it: *Held*, sufficient evidence of fraud to sustain a finding of fraud by the jury and to set aside the conveyance. *Ibid.*

3. *Fraud—Deeds and Conveyances—Consideration—Evidence—Instructions.*—Where there is evidence of a grossly inadequate consideration with other evidence of fraud in the procurement of a deed sought to be set aside on that ground, an instruction that the inadequate

FRAUD—*Continued.*

consideration alone would be sufficient to infer the fraud, will not be held as reversible error, or considered when given in response to the appellant's request. *Ibid.*

4. *Fraud—Deeds and Conveyances—Evidence.*—A grossly inadequate consideration given for a deed to lands may be considered upon the question of fraud in its procurement with other evidence thereof. *Ibid.*

5. *Fraud—Mortgages—Deeds and Conveyances—Burden of Proof—Evidence.*—In a suit to remove a cloud upon the plaintiff's title, Rev., 1509, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud: *Held*, the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the reformation or correction of a conveyance of land. *Ricks v. Brooks*, 204.

6. *Same—Equity—Subrogation—Accounting.*—Where the mortgagee has foreclosed under a power of sale in a valid mortgage and has conveyed the land in fraud of the mortgagor's rights under an arrangement between the purchaser and himself, the purchaser is entitled only to be subrogated to the right of his grantor, which is to foreclose under the mortgage, and an accounting of the debt may be ordered by the court, and, if the debt is not paid, with further appropriate relief for its payment. *Ibid.*

7. *Fraud— Receipts— Evidence— Presumptions—Rebuttal—Principal and Agent.*—Receipts obtained by fraud from the beneficiary in settlement of a policy of life insurance are only *prima facie* evidence of their correctness, and will not preclude the plaintiff, in her action to recover, from showing the true amount of the money she had received. *Norwood v. Grand Lodge*, 442.

GARAGE. See Bailment, 1; Negligence, 3, 4.

GASOLINE. See Mandamus, 3.

GENERAL ASSEMBLY. See Constitutional Law, 3.

GOVERNMENTAL AGENCIES. See Drainage Districts, 1.

GOVERNMENTAL POWERS. See Mandamus, 3.

GOVERNMENT CONTROL. See Corporations, 11.

GRANTS. See State's Land, 1.

GUARDIAN AND WARD. See Courts, 13.

HABEAS CORPUS.

1. *Habeas Corpus—Parent and Child—Custody of Child—Natural Parents—Right of Parents.*—The parents have *prima facie* the right to the custody and control of their infant children as a natural and substantive right not lightly to be denied or interfered with by action of the courts; but this right is not universal and absolute, and may be modified and disregarded by the court when it is made to appear that the welfare of the child clearly requires it. *Brickell v. Hines*, 254.

HABEAS CORPUS—*Continued.*

2. *Same—Adopted Child.*—Where, under legislative provision and before a court of competent jurisdiction of the cause and the parties, an infant child has been duly adopted, the care, custody, and control of the child is thereby transferred to the adopting parents, and the force and effect of the proceedings and decree will follow the parties on a change of domicile and control the personal relationship existing between them but the status of the adopting parents can be no better than that of the natural ones, and must give way to the latter where it appears, in *habeas corpus* proceedings, that the future welfare of the child will thereby be materially promoted. *Ibid.*

HARMLESS ERROR. See Appeal and Error.

HEALTH.

1. *Health—Statutes—Cities and Towns—Ordinances—Sale of Milk—License—Monopolies—Appeal—Constitutional Law.*—An ordinance of a city authorized by statute, requiring a license from those having dairies either within or without the city limits and selling milk therein, is not objectionable as tending to create a monopoly by a provision that it may be suspended or revoked for cause, or that no provision has been made for an appeal from the health authorities, the action of the authorities not being arbitrary and the question capable of being raised, in appropriate instances, by indictment, or by an application for mandamus, or by an action for damages. *S. v. Kirkpatrick*, 747.

2. *Health—Statutes—Legislative Discretion—Cities and Towns—Ordinances—Courts.*—The reasonableness or unreasonableness of an ordinance passed under the express provision of a valid statute, requiring a license from the sellers of milk within the corporate limits of a city, may not be inquired into by the courts, this question being solely within the discretion of the Legislature. *Ibid.*

3. *Health—Milk—Statutes—Ordinances—Cities and Towns—License—Discrimination—Constitutional Law.*—An ordinance requiring those selling milk within the corporate limits of a town, to obtain a license from its health authorities, with provision that it should not prevent the owner of two cows from disposing of his surplus milk if not peddled or vended, precludes the meaning that such owners may sell or come in competition with those of whom the license is required, and is not objectionable as an unlawful discrimination. *Ibid.*

4. *Health—Mandamus—Milk—License—Revocation—Orders in Force.*—In proceedings in mandamus to compel municipal authorities to issue a license for the sale of milk within the city limits, which had been revoked by the city authorities under a power contained in an ordinance authorized by statute, the order revoking the license will remain in force in order that unsanitary milk may not be sold pending the legal investigation. *Ibid.*

HEARSAY. See Boundaries, 1.

HEIRS. See Deeds and Conveyances, 2, 4.

HIGHWAYS.

1. *Highways—Actions—Commissioners—Parties—Statutes.*—In an action to determine whether the highway commission of a township or the

HIGHWAYS—*Continued.*

Central Highway Commission of Person County, under ch. 74, Public-Local Laws of 1917, have the right and power to locate a township road, the individual members of the commission as parties is surplusage and immaterial. *Highway Commission v. Central Commission*, 610.

2. *Highways— Statutes— Township Commission — Central Commission — Relative Duties.*—Under the provisions of ch. 74, Public Local Laws of 1917, secs. 7 and 12, that the Central Highway Commission of Person County shall make rules and regulations necessary for the control and management of the public roads of the county, and invested with authority to construct, improve, and maintain them, etc., and "to exercise all other rights and powers for the control and management as may now be vested in the board of county commissioners in that county"; and, also, that the township highway commission, under the general rules and regulations prescribed by the central commission, shall "have charge of the management of the laying out, constructing, altering and repairing and building of the public roads of the several townships; provided all the roads shall be laid out and constructed under the supervision of a competent and expert road engineer, acceptable to the central highway commission": *Held*, the township commission was given the exclusive power to lay out the roads in the respective townships. *Ibid.*

HOMICIDE. See Conspiracy, 1, 3; Criminal Law, 2.

1. *Homicide—Criminal Law—Deadly Weapon—Burden of Proof.*—Upon a trial for homicide, the burden is on the defendant to show matter in mitigation to the satisfaction of the jury, when the killing with a deadly weapon is proved or admitted. *S. v. Bailey*, 726.

2. *Homicide—Murder—Evidence—Self-defense—Threats.*—Where the only evidence in a trial of murder is self-defense, a witness may not testify of previous threats of the deceased to take the prisoner's life in the absence of evidence that such had been communicated to the prisoner, or that he was aware thereof at the time of the homicide. *S. v. Hines*, 758.

3. *Homicide—Murder—Evidence—Declaration—Written Statements—Burden of Proof.*—Upon a trial for murder, a written statement made by the deceased as to the facts constituting his murder, when aware of the opinion of his attending physician that he would not live through the night, comes within the principle of the competency of dying declarations, made under an impending sense of approaching death, and may be introduced by a witness present at the time, and aware of the circumstances under which it was made, with the burden of proof on the State to show such circumstances beyond a reasonable doubt. *S. v. Alexander*, 759.

4. *Homicide— Murder— Defenses— Insanity— Evidence— Opinions— Self-serving Declarations.*—Under a plea of insanity as a defense for murder, witnesses may testify to facts from which the jury may infer the unfounded apprehension of the prisoner that an enemy would attack him, but may not express an opinion as to the existence of this as a fact, or why the prisoner did not carry a weapon; and the prisoner's statement of why he did not do so, is a declaration in his

HOMICIDE—*Continued.*

own behalf; but under the evidence in this case, it is held to be immaterial. *Ibid.*

5. *Homicide—Murder—Insanity—Evidence—Declarations.*—Declarations of the prisoner on trial for murder and relying upon the plea of insanity, in defense, must in themselves be evidence of the unsound condition of his mind at the time he committed the offense, to be competent. *Ibid.*

6. *Homicide—Murder—Insanity—Evidence—Experts—Conversations—Declarations.*—The testimony of an expert on mental diseases in behalf of a prisoner being tried for murder and pleading insanity as a defense, is competent of conversations with the prisoner tending to show that he was unresponsible when he committed the crime, but they must not incorporate therein the self-serving declarations of the prisoner that shed no light on the condition of his mind at that time. *Ibid.*

HOTELS. See Sundays, 2.

HUSBAND AND WIFE. See Limitation of Actions, 1; Deeds and Conveyances, 7; Summons, 9; Alimony, 1, 2; Parties, 4; Judgments, 17.

1. *Husband and Wife—Estates—Entireties—Survivorship—Deeds and Conveyances—Relationship Not Designated.*—The estate by entireties under a deed of lands to husband and wife rests by common law upon their oneness, and does not depend upon the grantees appearing therein to be designated as having such relationship to each other, the fact of this relationship being alone sufficient; the survivor taking the entire estate free from the debts of the other, when the conveyance otherwise is sufficient. *Odum v. Russell*, 6.

2. *Husband and Wife—Alienation of Wife's Affection—Malice—Damages.* In order for the husband to recover punitive damages for the alienation of his wife's affection he must show directly or by implication that the act complained of was maliciously done, though not necessarily that it was done with ill will. *Cottle v. Johnson*, 426.

3. *Husband and Wife—Alienation of Wife's Affection—Punitive Damages.* Punitive damages may be awarded in the discretion of the jury, in the husband's action for alienating the affections of his wife, when the defendant's act was by fraud, malice, recklessness or oppression or other willful and wanton aggravation on his part. *Ibid.*

4. *Same—Criminal Conversation.*—The husband has personal and exclusive rights with regard to the person of his wife, and criminal conversation with her by another, notwithstanding her consent, constitutes an invasion of his rights. *Ibid.*

5. *Same—Instruction—Evidence—Appeal and Error—Reversible Error.*—Where there is allegation and conflicting evidence that the defendant alienated the affections of the plaintiff's wife and also had criminal conversation with her, it is error for the trial judge to charge the jury that they may award punitive damages, in their discretion, without instructing them upon the law relating to the principles upon which punitive damages may only be awarded. *Ibid.*

6. *Husband and Wife—Alienation of Wife's Affection—Measure of Damages.*—Compensatory damages awarded to the husband for the aliena-

HUSBAND AND WIFE—*Continued.*

tion of his wife's affection are for the loss of the society of his wife, and her affection and assistance, and for his humiliation and mental anguish. *Ibid.*

7. *Husband and Wife—Alienation of Wife's Affection—Evidence—Conversations—Correspondence—Collusion.*—Where, in the husband's action to recover damages for the alienation of the wife's affection, there is evidence that the plaintiff and his wife lived happily together for several years when defendant induced and enticed the wife to leave her husband and continue to live separate from him, and to the contrary, that defendant's improper treatment of his wife had caused her to do so, it is competent, as a part of the *res gestae*, to show the feelings existing between the husband and wife prior to and after defendant's alleged wrong, by conversations and correspondence between them, though not as substantive evidence of the defendant's wrong, and the court should, by proper instructions, confine their consideration of this evidence within its proper bounds, to avoid affording opportunity for collusion. *Ibid.*

8. *Husband and Wife—Deeds and Conveyances—Probate—Statutes—Conclusions—Presumptions—Evidence.*—The statute, Rev., 2107, only requires that the officer taking the probate of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed "is not unreasonable or injurious to her," and it will be conclusively presumed that it was upon sufficient evidence, and where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud, as other judgments may be" so attacked; as where the purchaser from the husband refuses to accept his deed upon the ground that the husband, having a short time previously conveyed the lands to his wife, her reconveyance was necessarily "unreasonable or injurious to her." *Frisbee v. Cole*, 469.

9. *Husband and Wife—Contracts—Leases—Breach—Damages—Married Women—Separate Property—Statute—Specific Performance—Equity.* A married woman may be held in damages for the breach of her contract in the lease of her separate lands for more than three years, though her husband has not joined therein or given his written consent thereto. Whether the lease in question is capable of specific performance under the provisions of Rev., 2096, authorizing a married woman to contract as a *feme sole* in certain instances, *Quaere? Miles v. Walker*, 480.

HYDROELECTRIC POWER. See Corporations, 2.

IDENTIFICATION OF LANDS. See Deeds and Conveyances, 6.

IMPEACHMENT. See Evidence, 10.

IMPROPER REMARKS. See Appeal and Error, 14.

INDEMNITY. See Insurance, 2, 3.

INDICTMENT. See Intoxicating Liquors, 2; Slander, 1.

Indictment—Rape—Two Offenses—Election—Court's Discretion.—Where two acts of the defendant are charged against him under an indict-

INDICTMENT—*Continued.*

ment for rape, the matter of the State electing as to one of them is within the sound discretion of the trial judge, and no abuse thereof appears when the two acts are mixed and dependent on each other, and under the attendant circumstances it would be impracticable to confine the prosecutor to one without seemingly destroying a *prima facie* case of guilt. *S. v. Cline*, 703.

INDORSEMENT. See Bills and Notes, 5.

IN FORMA PAUPERIS. See Appeal and Error, 6.

INFANTS. See Contracts, 6.

INJUNCTION. See Courts, 4; Eminent Domain, 5.

INSANITY. See Homicide, 4, 5, 6.

INSOLVENCY. See Corporations, 4.

INSTRUCTIONS. See Appeal and Error, 3, 15, 16, 25; Negligence, 8; Evidence, 2, 10, 17, 27, 31; Fraud, 3; Waters, 1; Bills and Notes, 4; Husband and Wife, 5; Railroads, 11, 13; Contracts, 15; Conspiracy, 3, 4; Libel and Slander, 5; Wills, 10.

1. *Instructions—Evidence—Deeds and Conveyances—Tenants in Common.* Where a purchaser from a tenant in common of lands, sets up, in partition proceedings, that he is also the sole owner of a definite part thereof under a deed, and it is controverted whether the deed covered only this separate part, a requested instruction to the effect that the purchaser was the owner in fee of this particular land, and not a tenant in common with the others, in the entire tract, is properly refused. *Bailey v. Mitchell*, 99.

2. *Instructions—Special Requests.*—Where the charge of the judge, construed as a whole, is substantially correct, any special feature of the case omitted by him should be covered by requests for special instructions thereon. *Beck v. Tanning Co.*, 124.

3. *Instructions—Special Requests—Evidence—Abstract Principles.*—Prayers for special instructions should not be mere abstract propositions of law, which are not applicable to the evidence, nor should they be based upon a partial statement of the evidence, omitting therefrom that which is material and relevant to the issues, and vitally essential to a proper consideration of the case by the jury. *Ibid.*

4. *Instructions—Opinion of Judge.—Held*, in this case, the instruction of the court was not objectionable as expressing an opinion inhibited by the statute. *Davis v. Blevins*, 125 N. C., 433. *Ibid.*

5. *Instructions— Trials— Negligence— Contributory Negligence— Assumption of Risks—Prayers for Instruction.*—Where an action to recover damages for a personal injury alleged to have been caused by the defendant's negligence involves the elements of assumption of risks and contributory negligence, and defendant has duly tendered prayers for instruction thereon, it is not required that the judge should have used the language of the prayers tendered, if he has charged properly and adequately thereon in his own language, and in a manner that was substantially responsive. *Jones v. Taylor*, 294.

INSTRUCTIONS—*Continued.*

6. *Same—Proximate Cause—Appeal and Error.*—Where, in an action to recover damages for a personal injury alleged to have been caused by the negligent order of an employer, the elements of assumption of risks and contributory negligence are involved, requested prayers for instructions thereon are properly refused which omit therefrom all reference to the consideration of proximate cause. *Ibid.*

7. *Instructions—Prayers for Instruction—Evidence—Verdict Directing Nonsuit.*—A request for an instruction that the jury return a verdict for the defendant if they believe the evidence, is substantially the equivalent of a motion to nonsuit thereon, in construing the evidence most favorably for the plaintiff. *Ibid.*

8. *Instructions—Carriers of Goods—Fertilizer—Delay in Delivery—Damages to Crop.*—In this action by the consignee to recover damages against the carrier for its negligent delay in delivering to him a shipment of fertilizer, the court properly charged the jury, upon the question of damages, to his crops, as to the plaintiff's burden of proof to show that it was the defendant's negligence that caused them and not weather or other conditions, etc. *Gatlin v. R. R.*, 433.

9. *Instructions— Evidence— Peremptory— Verdict Directing.*—Where the parties to an action substantially differ as to the essential facts in controversy, but the evidence is practically one way in regard to them, a charge of the court to the jury is proper, that if they found the facts to be as stated in the testimony of the witness, they should answer the issue as indicated in the charge, leaves the credibility of the witnesses to the jury, and is not objectionable as being peremptory or directing a verdict. *Grain Co. v. Feed Co.*, 654.

10. *Instruction—Prayers for Instruction—Appeal and Error.*—When the trial judge substantially gives requested instructions, in his own language, in his general charge, without thereby weakening their effect, it is sufficient, for he is not required to give them in their exact language. *Hall v. Giessell*, 657.

11. *Instructions—Recital of Evidence—Statutes—Appeal and Error.*—As to whether, under the circumstances of this case, the trial judge committed error in not sufficiently stating the evidence in the case to the jury as required by Rev., 535, *Quaere?* Brown, J., writing the principal opinion; Walker and Hoke, JJ., holding the view that a new trial should be granted upon the insufficiency of the evidence to convict of the charge of rape; and Allen, J., and Clark, C. J., dissenting upon the ground that the judge was not in error as to his statement of the evidence to the jury. *S. v. Cline*, 703.

12. *Instructions—Special Requests—Appeal and Error.*—It is not error for the judge not to have given requested instructions in their exact language when he has substantially given them in his own language. *S. v. Bailey*, 725.

13. *Instructions—Evidence—Appeal and Error.*—A request for special instruction containing statements or inference of fact that the jury alone is required to find is properly refused. *Ibid.*

14. *Instructions—Correct as a Whole.*—When the judge's charge construed as a whole is correct, an apparent error contained in a portion thereof is not reversible. *Ibid.*

INSURANCE. See Railroads, 6, 7; Actions, 7; Contracts, 11.

1. *Insurance— Policies— Contracts— Interpretation.*—The meaning of a policy of indemnity is ascertained by interpreting the entire writing, or from the policy considered as a whole. *Guarantee Corporation v. Electric Co.*, 402.

2. *Insurance—Employer and Employee—Master and Servant—Policies—Contracts—Indemnity—Interpretation.*—A policy of employer's indemnity insurance based on the premium to be paid as a certain per cent of the payroll of the employees, at certain locations, described the work covered by the policy as "electric light and power companies, operation, maintenance and extension of lines and making service connections," and it was understood and agreed that the policy should not apply to bodily injuries or death caused directly or indirectly by reason of the operation or maintenance of the street railway or its power line or any other work in connection with the street railway or railway power lines," with the further provision, "no work of any nature, not herein disclosed, is done by the assured at the places covered hereby, except the operation of street railways which is not covered hereunder": *Held*, the policy included everything except the operation of street railway, and with that exception, the premium due by the assured is based upon the full payroll. *Ibid.*

3. *Insurance— Policies— Indemnity— Caption— "Operation" — Interpretation.*—A policy of employer's indemnity insurance, issued to an electrical corporation giving the location for the work to be done describes the work covered by the insurance as "Operation, maintenance and extension of lines and making of service connections": *Held*, the word "operation" was not used as a mere caption or heading that included only "maintenance and extension of the lines and making service connections," but is itself one of the things to be insured, as if the policy had used the words "the operation of the line as well as maintenance and extension, including the making of service connections." *Ibid.*

4. *Insurance— Policies— Contracts— Ambiguity—Interpretation.*—The insured is entitled to a favorable interpretation of his policy when there is any ambiguity in its language. *Ibid.*

5. *Insurance—Fraternal Orders—Principal and Agent—Settlement—Fraud —Evidence—Nonsuit—Trials.*—An illiterate beneficiary brought her action against an insurance order and its local officer to recover upon a matured policy, and there was evidence tending to show that at the solicitation of the local officer she had made him her agent to collect the insurance upon this policy, and that in another company which had been carried by the insured, and in which she was the beneficiary; that while the local officer had remittances in full from both companies, he misrepresented that he had only been able to collect a part of the insurance, for that the insured had not been in good standing in either order at his death, and had her to endorse the remittances in full without knowledge of the facts, etc. Pending the action the defendant order, for which the codefendant was a local officer, had a committee to see the plaintiff and misrepresent that the money she had received was upon its policy and paid her the difference in money between that amount and the face value of its policy, and obtained a receipt in full: *Held*, sufficient to sustain plaintiff's allegation of

INSURANCE—*Continued.*

fraud against both defendants, and, if otherwise, at least to recover against the local officer, her agent, the balance of the money he had collected in her behalf; and any evidence of misrepresentations made by the committee of defendant order in obtaining the plaintiff's receipt in behalf of both defendants, was also competent against her agent, the local officer thereof. *Norwood v. Grand Lodge*, 441.

INSURANCE, ACCIDENT.

Insurance, Accident—Change of Occupation—Hazardous Risks—Electricity—Employer and Employee—Master and Servant.—The insured was employed as superintendent or supervisor of a corporation engaged in the transmission and manufacture of high power electricity, and his employment was so designated in his policy of insurance, wherein it was stipulated that it would not be forfeited by a change of occupation to one therein designated as in a more hazardous class, for which a higher premium was charged, but that the amount of loss, in case of death, etc., would be diminished in proportion to the difference in the premiums charged. The duty of a lineman was in a more hazardous class, requiring a higher premium than the occupation of superintendent, and the insured was killed from the effect of a current of electricity received by him when cutting a wire to remove a kink therefrom when instructing the lineman how to do so, this being in the course of the lineman's duty to his employer: *Held*, the act of the insured in showing the lineman how to remove the kink came within the scope of the superintendent's or supervisor's employment as such, and was not a change to a more hazardous employment; and it was reversible error for the trial court to direct a verdict in defendant's favor, that the plaintiff could only recover the reduced amount. *Smith v. Ins. Co.*, 489.

INSURANCE, FIRE. See Actions, 3.

Insurance, Fire—Damages—Subrogation—Statutes—Equity.—Where the insurer against loss by fire has paid the loss to the owner of the building destroyed by the actionable negligence of another, the insurer is subrogated to the rights of the owner, both in equity and under the statutory form of the policy, Rev., 4760, and may maintain his action against the tort feasor and recover the amount he has so paid, covered by the policy contract; and the owner is a proper party thereto as the holder of the legal title, through whom the right of the insurer is to be enforced. *Ins. Co. v. R. R.*, 256.

INSURANCE, LIFE.

1. *Insurance, Life—Reinsurance—Premiums—Payments—Renewals—Statutes—Notice—Contracts.*—Where a life insurance company has issued its policy prior to the enactment of ch. 884, Laws 1909, requiring that a written or printed notice be mailed, postage paid, addressed to the insured or the assignee of the policy at his or her last known postoffice address in the State, stating the amount of premium due, installment, or portion due thereon, etc., and subsequent to said enactment, the insurer has reinsured with another company, which assumed its obligations and under a contract with the insured has issued another policy in the place of the old one: *Held*, the new policy so issued comes within the expressed terms of the act—any

INSURANCE, LIFE—*Continued.*

policy "hereinafter issued," and the subsequent payment of premiums is also a "renewal" within its terms, and requires that in the absence of the statutory notice, the policy may not be declared lapsed or void "within one year after default in payment of any premium," etc. *Garland v. Ins. Co.*, 67.

2. *Same—Waiver—"Blue Notes"—Illegal Stipulations.*—Where the statutory notice of premiums due, etc., on a policy of life insurance has not been given as required by ch. 884, Laws 1909, and thereafter the company accepts payment of the premium in part and a "blue note" for the balance, the waiver therein of the statutory notice is illegal and unenforcible. *Ibid.*

3. *Insurance, Life—Reinsurance—Special Contracts—Evidence—Questions for Jury—Trials.*—Where a life insurance company has assumed all the obligations of another insurer, and has reissued its policies under an agreement to set aside a further sum each year for the benefit of the policy holders, the question as to whether it has done so and paid it, under conflicting evidence in the insured's action to recover it, is one for the jury. *Ibid.*

4. *Insurance, Life—Breach by Insurer—Actions—Ill Health—Measure of Damages—Value of Policy—Deductions—Reinstatement.*—Where a life insurance company has wrongfully attempted to cancel or annul a policy it had issued, and has unlawfully refused to accept the premium tendered, at a time when, by reason of disease, the insured cannot pass a successful physical examination, he may elect to treat the policy as at an end, and recover its face value, reduced by the premiums he may reasonably thereafter be called upon to pay, and such amount that would be due him under any special contract made for his benefit by a reinsuring company, and as the jury may determine under the evidence; unless in this case the defendant elects to reinstate the policy sued on, by accepting plaintiff's offer made before bringing his action. *Ibid.*

5. *Insurance, Life—Fraternal Orders—Representations—Warranties—Actions—Statutes.*—Rev., 4794, amended by ch. 46, Laws 1913, groups benevolent life insurance companies providing death benefits in excess of $300, in any year to any one person, as fraternal benefit associations, and those of $300 or less, as fraternal orders, and to the former, sec. 4795, relating to fraternal orders, does not apply, and hence fraternal benefit associations fall within the provision of sec. 4808, that statements or descriptions in the application for the policy are deemed representations and not warranties, which will not avoid a recovery, when untrue, unless material. *Gay v. Woodmen*, 210.

6. *Insurance, Life—Arrears in Dues—Notice—Forfeiture—Matters of Defense—Evidence—Nonsuit—Trials.*—Where the insurer admits in an action on a life insurance policy, its liability, unless, as it contends, the insured was not in good standing for failure to pay the last assessment before her death, and it was contended by the plaintiff that this would not work a forfeiture because of the failure of the defendant in its duty to give notice of arrears in dues: *Held*, the matters to avoid liability were for the defendant to prove, and any negligence in failing to give the required notice by the officers of the company being negligence of the defendant, a motion as of nonsuit

INSURANCE, LIFE—*Continued.*

upon evidence of this character was properly denied. *Carden v. Sons and Daughters of Liberty*, 399.

7. *Insurance, Life—Fraternal Orders—Payment of Dues—Principal and Agent.*—A member of a fraternal order had a credit in its local lodge for sick benefits, more than sufficient to pay his dues to its district lodge for a certificate of insurance issued only by the latter lodge, and while the local lodge was not the agent for the district organization for the collection of dues, its secretary and treasurer was its duly authorized agent for that purpose. The policy of insurance in the district lodge matured upon the death of its member, and payment thereof was refused to the beneficiary upon the ground that the member was not in good standing therein for failure to pay his dues, though more than sufficient money was in the hands of the secretary and treasurer of the local lodge to have paid them when due: *Held*, by the operation of law, the moneys in the hand of the secretary and treasurer of the local lodge were applicable to the dues owing by the member to the district lodge, *eo instanti* it came into his hands, as the authorized agent of the district lodge for their collection, irrespective of his omission to forward them, and the policy was not void for the nonpayment of the dues. *Connor v. Odd Fellows*, 494.

INTENT. See Libel and Slander, 2; Deeds and Conveyances, 3; Wills, 5, 9; Eminent Domain, 4; Conspiracy, 4; Intoxicating Liquors, 5; Attachment, 1.

INTEREST. See Boundaries, 1; Taxation, 10; School Districts, 3.

INTERSTATE COMMERCE. See Carriers of Goods, 2.

INTERSTATE COMMERCE COMMISSION. See Carriers of Goods, 2.

INTOXICATING LIQUORS.

1. *Intoxicating Liquor—Manufacture—Evidence—Questions for Jury—Trials.*—Testimony tending to show that the defendants came in the early morning to a place where everything was complete for the illicit manufacture of intoxicating liquor except the still itself, which they brought and placed on the furnace already there, and cut wood and did other acts for operating the distillery, is not solely evidence of an intent to commit the unlawful act, but circumstantial of the fact that the defendants were engaged in this unlawful business, and sufficient for the determination of the jury. *S. v. Perry*, 718.

2. *Intoxicating Liquors—Spirituous Liquors—Unlawful Sale—Statutes—Exceptions—Indictment—Defense.*—An indictment for the unlawful sale of spirituous liquors, Laws 1913, ch. 44, sec. 6, is sufficient which charges the unlawful and willful sale thereof, without naming the person whom sold, or negativing the conditions under which it may lawfully be sold; such as that it was not domestic wines or sold in more than two and one-half gallons, or in unsealed packages, etc., the protective provisions of the statute (sec. 1) being matters of defense. *S. v. Hicks*, 733.

3. *Intoxicating Liquors—Spirituous Liquor—Time not of Essence—Place of Sale—Pleas—Abatement.*—The time of offense of selling intoxicat-

INTOXICATING LIQUORS—*Continued.*

ing liquors, contrary to the statute, is not of its essence and obligation that the sale did not take place in the county, may only be taken by plea in abatement. *Ibid.*

4. *Intoxicating Liquors—Spirituous Liquors—Unlawful Sales—Evidence—Nonsuit—Trials.*—Judgment as of nonsuit upon the evidence cannot be taken in an action for the unlawful sale of domestic wine, on the premises, etc., under Laws of 1913, ch. 44, permitting the sale of quantities of less than two and one-half gallons in sealed packages, etc., when there is evidence that the witnesses bought two gallons of the liquor from the defendant, which the latter poured into the witness's jug, which the latter carried away unsealed, the burden being on the defendant to show the wine was of his own manufacture, sealed or crated, etc., and other matters of a lawful sale made an exception by the statute to its other provisions. *Ibid.*

5. *Intoxicating Liquors—Evidence—Collateral Crimes—Motive—Intent—Statutes—Spirituous Liquors.*—Where there is evidence that defendant had liquor in his possession for the purpose of sale, in violation of the statute, evidence that he had liquor in his possession and had sold the same a year previous in another county, is not so connected with or related to the offense charged as to be competent to show the intent or guilty knowledge in committing the same, nor is it within the reason of the rule which admits evidence of collateral crimes to prove motive or intent. *S. v. Beam*, 768.

IRREGULARITIES. See Elections, 1, 2, 3; Judgment Set Aside, 1; Municipal Corporations, 5.

ISSUES. See New Trials, 1; Seduction, 1; Wills, 8; Appeal and Error, 19.

1. *Issues—Compensatory Damages—Punitive Damages—Courts—Discretion.*—Where in an action for damages there is allegation and conflicting evidence sufficient to sustain a verdict of both compensatory and punitive damages, the better practice is to separate these issues, though this matter is addressed to the discretion of the trial court. *Cottle v. Johnson*, 427.

2. *Issues—Contracts—Breach—Lands—Specific Performance.*—An issue as to whether the plaintiff had complied with the terms of his contract between him and the defendant is sufficient for either party to show the terms of the contract, as well as a breach thereof by the plaintiff, in an action to enforce specific performance to convey lands. *Drennan v. Wilkes*, 512.

3. *Issues—Forms.*—The form of the issues is of no consequence if under them the material issuable facts may be fairly presented to the jury, and the trial is otherwise without error. *Ibid.*

4. *Same—Evidence.*—The settling of issues upon the trial is within the discretion of the judge, and not reviewable on appeal if the parties have had opportunity to offer evidence upon every material phase of their contentions. *Ibid.*

5. *Same—Admissions—Contracts—Specific Performance.*—In an action to enforce specific performance of a contract to convey lands, an issue as to the making of the contract sued upon is not required when

ISSUES—*Continued.*

admitted in the answer, and the other issues are sufficient to sustain the judgment appealed from. *Ibid.*

6. *Issues—Negligence—Employer and Employee—Master and Servant—Federal Employer's Liability Act—Statutes—Legal Dependents.*—In an action to recover damages for the negligent killing of the deceased by a railroad company while engaged in interstate commerce under the provisions of the Federal Employer's Liability Act, an objection is untenable that the damages should have been assessed *in solido* upon a single issue, nor is it reversible error to have submitted separate issues on that question, as to each of the legal dependents of the deceased, applying to each the approved interpretation of the Federal statute, that the pecuniary loss suffered or to be reasonably expected by such dependent is a measure of liability. *Horton v. R. R.*, 175 N. C., 472, and *Hudson v. R. R.*, 176 N. C., 488, cited and applied. *Moore v. R. R.*, 637.

7. *Issues—Appeal and Error—Trials.*—It is not error for the trial judge to refuse issues tendered, if those submitted to the jury are sufficient to embrace every essential question in dispute between the parties and for them to present every material phase of the case. *Hall v. Giessell*, 657.

JUDGMENTS. See Actions, 2; Alimony, 1, 2; Parties, 2; Courts, 4, 7, 11; Pleadings, 2; Taxation, 1; Usury, 4; Appeal and Error, 5, 10, 23, 24, 34; Railroads, 7; Drainage Districts, 3, 5, 6; Corporations, 4, 8; Public Sales, 1; Title, 3; Criminal Law, 3; Trusts, 3, 4; Attachment, 2; Parties, 4; Costs, 2.

1. *Judgments—Estoppel—Scope of Inquiry—Reference—Extraneous Findings—Actions—Quasi in Rem.*—Where, under a will, the children and granchildren of the testator take a defeasible fee in remainder after the death of the first taker, and after a receiver has been appointed by the court to manage the estate, action has been brought solely for the purpose of returning the residue, not disposed of, to the administrator with the will annexed, and a referee has been appointed for an accounting, his finding, approved by the judge, that the remaindermen acquired such estate in fee, is neither involved within the scope of the inquiry nor the issue, and cannot conclude the parties as to their actual title, especially where the grandchildren have not been made parties or represented by guardian. The principle by which a judgment *quasi in rem* may affect and conclude all persons, whether parties or not, distinguished by *Walker, J. Thompson v. Humphrey*, 45.

2. *Same—Fee—Defeasible Fee—Consistent Findings.*—In this case it is *Held*, where the children of the testator took a defeasible fee under his will, the referee's report upon an accounting of a former receiver, that the children took a remainder in fee is not inconsistent with the fact that they took a defeasible and not a fee-simple absolute title. *Ibid.*

3. *Judgments—Minors—Next Friend—Consent—Actions—Bar—Court's Approval—Questions of Law—Courts—Trials.*—The next friend of a minor suing to recover damages for an alleged negligent injury has no authority to compromise and adjust the claim without sanction

JUDGMENTS—*Continued.*

and approval of the court on investigation of the facts, and where a former judgment is set up as a bar to the present action purporting to show that the plaintiff's claim had been settled and compromised by consent, it will not be so considered, as a matter of law, when it appears in the judgment, thus relied upon, that, *prima facie*, it had been made by the parties without the supervision of the court; and when the plaintiff is permitted by the court to reply, and, after setting forth the facts, he avers that the said judgment is colorable and collusive and in fraud and substantial prejudice to the minor's rights, an issue of fact thereon is presented for the determination of the jury. *Rector v. Logging Co.*, 59.

4. *Same—Pleadings—Fraud—Questions for Jury.*—Where it appears of record that a next friend of a minor had been appointed to enter suit for damages for an alleged negligent injury, and a consent judgment had been entered in a certain sum, reciting a compromise and settlement, etc., which consent was signified by the signing by the attorneys for the parties, this judgment, upon its face, does not purport to have had the interests of the minor investigated and determined by the court, and is insufficient, as a bar to a subsequent action, as a matter of law. *Ibid.*

5. *Judgments—Estoppel—After Acquired Property—Tenants in Common—Parties.*—Where the four children and heirs at law of a fifth child were tenants in common of the lands of their deceased father, and in proceeding to partition the lands among themselves and a purchaser from one of them, all persons in interest had been made parties, the adjudication in a former adverse action, in which the heirs at law of the deceased child had not been made parties, that the interest of each was an undivided one-fourth, will not conclude the court, in the present proceedings, as to the one-fifth interest not formerly represented, or estop one of the children from showing that he had subsequently acquired the interest of two others of them as formerly ascertained, proportionately reduced to the extent of the additional interest presently represented. *Bailey v. Mitchell*, 99.

6. *Judgments—Estoppel—Pleadings—Scope of Inquiry.*—A final judgment of a court having jurisdiction of the cause and of the parties estops the parties as to all issuable matters embraced by the pleadings that are material and relevant irrespective of whether they have been presented in the course of the trial; and where a deputy United States Marshal has assigned his fees and expenses as such to another, with order on the U. S. Marshal to pay them, and it has been theretofore adjudicated by final judgment, that a recovery may not be had against the deputy marshal, the purchaser will be estopped from again prosecuting his action, whether he sues to recover upon the writing or the moneys he has paid in the transaction. *Moore v. Harkins*, 167.

7. *Judgments—Excusable Neglect—Motion to Set Aside—Appeal and Error—Negligence.*—Where it is found as a fact by the Superior Court judge, in denying a motion to set aside a judgment for excusable neglect, that, though the defendant was sick, his illness did not impair his faculties to the extent of preventing him from attending efficiently to his case, and he had shown himself fully capable of

JUDGMENTS—*Continued.*

attending to this and other matters of litigation, and to his business interests generally, at his home, to which he was confined, and that the present action being in another county, he did not employ attorneys therein, and wrote only to nonresident attorneys at the time of placing the matter in their hands for attention, and gave it no further consideration, and judgment final, for the want of an answer, was eventually taken against him: *Held*, such facts did not show the attention of a man of ordinary prudence to his own affairs; that the fact that he had not employed attorneys practicing in the county of trial could be considered on the question of his neglect, and under this and the further facts found showing inexcusable indifference to the case, the motion was properly denied. *Jernigan v. Jernigan*, 237.

8. *Judgments—Default and Enquiry—Pleadings.*—Allegations of a complaint against a railroad to recover a specified amount of damage to shipment of carload of cantaloupes for defendant's failure of its obligation to furnish cars at a specified time and place for the loading, are insufficient for judgment by default final, and such judgment may not be rendered in the course and practice of the courts. *Bostwick v. R. R.*, 485.

9. *Judgments—Irregular Judgments—Motion to Set Aside—Limitation of Actions—Statutes.*—Where a judgment by default has been irregularly entered, it may be set aside, on motion made within a reasonable time and on a proper showing of merits, in the sound legal discretion of the court, and in proper instances more than twelve months after the rendition of the judgment, this period being a statutory restriction applying only to judgments entered according to the course and practice of the courts, wherein it is necessary that motions to set aside the judgments be made. Rev., 513. *Ibid.*

10. *Judgments—Default Final—Motions—Statutes—Limitation of Actions.* Allegations in the complaint in an action to recover damages to a shipment of cantaloupes that it had been sold to a particular customer at a certain price, which sale had been lost by the breach of contract of defendant railroad to furnish a car; that upon presentation of claim the defendant had instructed plaintiff to sell the melons to the best advantage and deduct the price from the total demand, which the plaintiff had done, leaving a balance in a certain sum set out in the complaint for which judgment is claimed, and showing the amount of loss deducted, if sufficient to sustain a judgment by default final, in that sum, for the want of an answer in accordance with the course and practice of the courts. *Ibid.*

11. *Judgments—Default—Pleadings—Allegations—Several Causes—Default Final—Actions.*—Where a complaint states two or more causes of action arising from the same default and any one is sufficient to uphold a judgment by default final for the want of an answer, which has been entered in the due course and practice of the courts, such judgment will be upheld. *Ibid.*

12. *Judgments—Default and Enquiry—Default Final—Implied Admissions—Definite Damages—Computation—Statutes.*—Where a judgment by default may be entered in the due course and practice of the courts, an inquiry is only necessary where the amount of the claim is uncertain, but where the claim is precise and final by the agreement of

JUDGMENTS—*Continued.*

the parties or can be rendered certain by mere computation, there is no need of proof, for the judgment by default admits the claim, and a judgment by default final should be entered. Rev., 556. *Ibid.*

13. *Judgments— Attachment— Notice — Statutes — Summons — Service by Publication.*—Attachment of the lands situated here of the nonresident husband, is not necessary to subject it to the payment of alimony regularly allowed the wife *pendente lite* her suit for divorce, upon publication of summons, or to declare the husband her trustee in his purchase of lands with her separate money, to which he had taken title in himself, without her consent, nor in either case is any notice required beyond publication of summons. Rev., 449. *White v. White*, 592.

14. *Judgments—Motions to Set Aside—Statutes—Notice—Alimony—Limitation of Actions.*—The provisions of Rev., 449, as to setting aside judgments against nonresident defendants served by publication, upon motion showing sufficient cause, made within a year after notice, and within five years after its rendition on such terms as may be just, with restitution, etc., does not apply where the lands have been regularly sold under an order of court in divorce proceedings, of which the defendant had notice, to pay the wife alimony which had been allowed her. *Ibid.*

15. *Judgments—Motions to Set Aside—Affidavits—Evidence—Meritorious Defense.*—Allegations by the movant to set aside a judgment, for irregularity, that he has "a good and meritorious defense," is but his own opinion, and is insufficient; nor is it aided by erroneous statements of matters of law or of conflicting facts that have been judicially found adverse to his contentions. *Ibid.*

16. *Same—Limitation of Actions.*—No "good cause is shown" to set aside a judgment allowing alimony to the wife *pendente lite* her action for divorce, or in a suit to declare him her trustee in taking title to lands bought with her money and without her consent, where publication of summons has been regularly made, under Rev., 449, and in proceedings regular upon their face, when the motion has been made after a lapse of nearly five years, the defendant had actual knowledge of the action, and the death of the wife has caused the loss of the evidence upon which the judgments were rendered. *Ibid.*

17. *Judgments—Husband and Wife—Action Against Wife—Independent Action—Equities of Wife—Equity.*—Where the husband is sued in ejectment to final judgment, and thereafter summons is issued as a continuance of the same cause to recover a judgment against the wife, the action against her is properly dismissed, it being allowed the plaintiff to bring an independent action against her, and for her to prosecute her suit against her husband for the enforcement of equities she may claim from him in the lands. *Quelch v. Futch*, 691.

JUDGMENTS, SET ASIDE.

Judgments, Set Aside—Irregularities—Meritorious Defense—Findings—Appeal and Error.—The denial by the statute of the plaintiff's allegations in an action for divorce, Rev., 1564, presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action. *Campbell v. Campbell*, 414.

JUDICIAL SALES.

Judicial sales—Bidders—Proposed Purchasers—Sales.—The highest bidder at a judicial sale is only regarded as a proposed purchaser, who acquires no independent right in the land, or the suit, until the sale has been reported to the court and confirmed, in the course and practice of the courts. *Perry v. Perry*, 445.

JURISDICTION. See Courts, 1, 2, 3, 4, 8, 15, 19; Corporations, 16; Monopoly, 1; Parties, 1; Removal of Causes, 4; Divorce, 1; Public Sales, 1; Constitutional Law, 2; Superior Courts, 1.

JURORS. See Appeal and Error, 31.

1. *Jurors—Expressed Opinion—Fair Trial—Qualification—Findings—Appeal and Error—Courts.*—Where a juror states on his *voir dire* that he has formed and expressed an opinion that the prisoners on trial for homicide were guilty, but this opinion was based upon talking with his neighbors and reading the newspaper accounts, but that, notwithstanding, as a sworn juror he could hear the evidence and the charge of the court and render a fair and impartial verdict, the finding of the court that he was an impartial juror will not be disturbed on appeal. *S. v. Bailey*, 724.

2. *Jurors—Challenge—Several Defendants—Rejection by One Defendant.* The right of a defendant is to challenge and reject a juror on sufficient grounds, and where several defendants are on trial for the same homicide one of them may not complain that a juror he had accepted had been rejected by another defendant. *Ibid.*

JURY. See Appeal and Error, 7.

JUSTICES OF THE PEACE. See Courts, 8; Constitutional Law, 2; Slander, 1.

JUVENILE COURTS. See Courts, 13, 15, 16, 19, 20, 21, 22.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Possession—Adverse Title—Surrendering Possession—Assigning Tenant—Estoppel.*—One who has entered into possession of lands as lessee of and under the title of another, and who retains the possession thus acquired, cannot resist an action by the lessor for its recovery brought after the termination of the lease, by showing a superior title in another, or in himself, acquired either before or after the contract of lease, and this element of estoppel applies to any one to whom the tenant has assigned, and who has entered into possession under him. *Timber Co. v. Yarbrough*, 335.

2. *Landlord and Tenant--Leases—Destruction of Premises—Payment of Rent—Statutes—Common Law.*—The common-law doctrine that the lease of a store or other building conveying the present right to the soil, does not relieve the lessee of his obligation to pay the stipulated rent during the term unless the contract so provides or the lessor is under contract to repair, when the building is destroyed by accidental fire, or so injured as to be unfit for its purpose, has been modified to some extent by our statute, Rev., 1992, providing in such instances, and where the main inducement for the contract was the use of the house, that the lessee may surrender the estate by a writing to that

LANDLORD AND TENANT—*Continued.*

effect delivered within ten days from the damage and on paying the rent accrued and apportioned as to the remainder of the injury, etc. *Miles v. Walker*, 479.

3. *Landlord and Tenant—Leases—Rent—Voluntary Repairs—Contracts—Breach—Damages—Lessor and Lessee.*—Though the landlord may be under no implied obligation to restore or repair a building which had been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for breach the landlord may be held responsible. *Ibid.*

4. *Same—Evidence.*—The leased premises, consisting of a building for a store was accidentally destroyed by fire during the leased period, without fault on the part of the lessee, the consideration being a stipulated monthly rental and the lessee's placing within the building certain shelving to become the property of the lessor at the termination of the lease, for one year or an extension of three years upon a certain further consideration. Soon after the commencement of the lease with the lessee in possession, and while preparing to put in the shelving, the fire occurred, and the landlord entered into possession, and erected a more attractive store building for which he could get a higher rent than for the destroyed store, and refused to let the lessee into possession, but rented it to another, for which the latter brings his action for damages: *Held*, sufficient to sustain a verdict in plaintiff's favor. *Ibid.*

5. *Landlord and Tenant—Leases—Rent—Repairs—Consideration—Reasonable Time—Independent Obligations.*—Where a monthly rental to be paid by the lessee for a building, and an obligation to make certain repairs by him, is specified as the consideration for the lease, with forfeiture of the lease upon the nonpayment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent obligations, and the law will imply that the lessee be given a reasonable time in which to make the repairs if none is stated in the lease. *Ibid.*

6. *Landlord and Tenant—Lease—Parol Lease—Statute of Frauds—Statutes.*—A parol lease of lands for more than three years after the date of making the agreement is void under the statute of frauds, and our own statute, Rev., 976, and not from the time it goes into effect: and a parol agreement of lease to commence *in futuro* for the full three-year period makes the tenant in possession a tenant at will, the rental price being that agreed upon in the parol lease. *Mauney v. Norvell*, 628.

7. *Same—Acceptance of Rent—Waiver—Appeal—Bond.*—A landlord, by accepting the rent from a tenant at will in possession, receives only that which is due him, and this cannot have the effect of waiving his rights under Rev., 976, to declare void a parol lease of more than three years, or render such lease a valid one; and on the tenant's appeal from a justice's court in a summary action of ejection, the tenant is required to give bond for the payment of the rent, etc., Rev., 2008. *Ibid.*

LANDLORD AND TENANT—*Continued.*

8. *Same—Deeds and Conveyances—Registration—Notice.*—In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and, consequently, the lease must be in writing; and hence a parol lease, void under Rev., 976, cannot have this effect. Rev., 980. *Ibid.*

LESSOR AND LESSEE.

1. *Lessor and Lessee—Leases—Covenant to Repair—Negligence—Act of God—Landlord and Tenant.*—The lessee's covenant to maintain the leased premises in its present condition is equivalent to a general covenant to repair and leave in repair under the common law, and unless otherwise stated in the lease or provided by statute this duty is not affected by the lessee's negligence or the fact that the property had been destroyed during the continuance of the lease by the act of God or the public enemy. *Chambers v. North River Line*, 199.

2. *Same—Common Law—Statutes—Modification—Ice—Fire.*—Where a wharf and pier are the subjects of a lease wherein the lessor has covenanted to maintain, etc., and its partial destruction was caused by the breaking up of the ice on the water, the lessor's obligation is not affected by our statute, Rev., 1935, which modifies the common law only in instances where the leased premises is destroyed or damaged to more than one-half of its value by accidental fire not occurring from the want of ordinary diligence on the part of the covenanter. Rev., 1992, is confined to demised houses or other buildings, expressly excluding "agreements respecting repairs, etc.," and has no application. *Ibid.*

3. *Lessor and Lessee—Leases—Covenants to Repair—Rents.*—Where the lessor has failed to fulfill his covenant obligating him to repair the leased premises, he may not successfully resist his lessor's demand for the full payment of rent contracted for, on the ground of the worthlessness of the premises after its partial destruction. *Ibid.*

LIBEL AND SLANDER.

1. *Libel and Slander—Slander.*—Libel or written slander is distinguished from oral slander, in that the former is actionable if it tends to render the party of whom it is written liable to disgrace, ridicule, or contempt, and it need not impute any definite infamous crime. *Hall v. Hall*, 571.

2. *Libel and Slander—Intention—Evidence—Questions for Jury—Damages—Punitive Damages—Slander.*—A letter written to the married daughter of the plaintiff, in an action for libel, stated "I hate to expose him, as he is my brother and your father, but he is trying to expose me, and I will have a suit for him when he comes over," that he had taken from another a load of fodder from his stack in the darkness of night, and had put it in his wagon and hauled it off; that his half sister had been telling "some ugly tales on him" of his making her sit on his lap, hugging her, and wanting her to hug him; that he had given her some articles of apparel that he should have given his own wife and daughters; that the half sister had said "he

LIBEL AND SLANDER—*Continued.*

had cut a shine over her, and she was afraid of him," etc.: *Held*, sufficient for the determination of the jury of whether the defendant had intended to charge the plaintiff with the crimes of stealing and attempted incest with his half sister, and of malice sufficient upon which punitive damages may be awarded by them in addition to actual or compensatory damages. The charge of the judge in this case is approved. *Ibid.*

3. *Libel and Slander—Public Officers—Publication—Qualified Privilege—Falsity—Implied Malice.*—It is to the public interest that the conduct and qualifications of officials and candidates for public office be subjected to free and fair criticism and discussion by their constituents, and such presents a case of qualified privilege, and to convict of libel for defamatory publication of this character, by a newspaper and its editor, it must be shown that it is both false and malicious, its falsity not of itself sufficient to establish malice, there being a presumption that the publication was made in good faith. *S. v. Publishing Co.*, 720.

4. *Same—Criminal Actions—Burden of Proof—Quantum of Proof.*—The malice to sustain a criminal prosection for libel of public officials is not necessarily that of personal ill-will or malevolence, and it may exist, in such cases, from some ulterior motive and inferred when the defamatory statement is knowingly false or without any reasonable grounds to believe in its truth, or, at times, from the character and circumstances of the publication itself, and the statements, as in actions of this character being qualified privilege, the burden is on the State to show throughout the trial, beyond a reasonable doubt, that the defamatory charge is both false and malicious. *Ibid.*

5. *Same—Instructions—Appeal and Error.*—In a criminal prosecution against a newspaper and its editor, for publishing a libel against a sheriff standing for reëlection, charging in effect that the prosecutor had been unlawful and criminally negligent in the performance of his official duties in reference to enforcing the statutory provisions applicable to deserters and slackers, under the Federal Draft Act, though the publication contained a charge of a crime, yet being a case of qualified privilege, it was reversible error for the judge to charge the jury that the law would imply malice and place on defendant the burden of repelling the imputation. *Ibid.*

6. *Same—Newspapers—Editors—Evidence—General Complaint.*—In a criminal action for libel against a newspaper and its editor for publishing a statement that the sheriff of the county, standing for reelection, was unfaithful and criminally negligent in the performance of his official duties under the Federal Drafts Act as to deserters and slackers, etc., evidence is competent that there was a general complaint to that effect in the county, as tending to show good faith on the part of the defendant in making the publications, though ordinarily not competent to show the truth of the defamatory charge, and its exclusion by the court is erroneous. *Ibid.*

LIENS.

Liens—Municipal Corporatics—Cities and Towns—Sidewalks—Paving—Statutes—Limitation of Actions.—The lien given a city or town on

LIENS—*Continued.*

the lots of an owner along its streets for paving its sidewalk, rests only by statute, Rev., 395, subsec. 2, and not by common law, and is enforcible only against the lots, *in rem*, and not against the owner individually or out of his other property, and to enforce the same action must be commenced within three years next after the completion of the work, or it will be barred by the statute of limitations. *Morganton v. Avery*, 551.

LIMITATION OF ACTIONS.

1. *Limitation of Actions—Adverse Possession—Husband and Wife—Title —Color—Possession.*—A wife does not hold possession adversely to her husband while living on his lands with him as such, and therefore cannot acquire title against his by adverse possession under color. *Hancock v. Davis*, 282.

2. *Same—Descent and Distribution—Color.*—The husband was in possession of the *locus in quo*, without deed, in 1870, listed the lands for taxes in 1871, failed to pay the same, and it appeared of record that his minor son was purchaser at the sale, and after his death in 1891 the former sheriff executed a deed in the name of the son, and conveyance was made in that name to the wife, who continued to live with her husband until 1912, the day of his death intestate, without his having conveyed her the land, but retained possession of it as his own, for a sufficient time to ripen the title in himself: *Held*, the possession of the wife could not be adverse to the husband until his death, and such being for insufficient time thereafter, the land descended to the heir at law, subject to the widow's right of dower. *Ibid.*

3. *Limitation of Actions — Pleadings — Amendments — Statutes — Sister States—New Cause of Action.*—When the cause of action for damages for a wrongful death arose in another State, wherein a statute provides that it shall be brought within twelve months from the time of the death, but if the action has been commenced within the stated time and abates or is not decided upon its merits, and another suit is commenced in twelve months thereafter, no part of the first period shall be counted, an objection to an amendment to the complaint in an action brought in our own courts, upon the ground that it sets up a new cause of action, after the statute had run, by alleging the statute of another State permitting a recovery in actions of this character, is untenable when the suit was commenced in the statutory time and the amendment was allowed within the second statutory period; and *Held further*, the objection is untenable under our own decisions. *Renn v. R. R.*, 170 N. C., 128. *Whittington v. Iron Co.*, 648.

LIS PENDENS.

1. *Lis Pendens—Pleadings—Corporations—Officers—Principal and Agent —Actual Notice.*—Where the president of a corporation, the substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's rights, taken deed for same from his company, before complaint filed, he and his corporation are concluded from setting up

LIS PENDENS—*Continued.*

the doctrine of *lis pendens* as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance. *Morris v. Basnight*, 299.

2. *Same—Statutes—Constructive Notice.*—The doctrine of *lis pendens*, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given, pursuant to statutory regulations, Rev., 462, which relates to constructive notice and its effect on subsequent purchasers, but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose, and the specific property to be affected. *Ibid.*

MAIL. See Evidence, 4.

MAINTENANCE. See Estates, 9.

MALICE. See Husband and Wife, 2; Libel and Slander, 3.

MANDAMUS. See Monopoly, 2; Health, 4.

1. *Mandamus—Corporations—Public Utilities—Discrimination—Rates—Courts.*—Where a public-service corporation has discriminated among its patrons in its charges for the same or similar service, a mandamus will lie to compel it to charge a uniform or undiscriminating rate; for the question does not require the courts to fix a rate, or pass upon its reasonableness, the lowest rate charged becoming, automatically, the proper one. *Public Service Co. v. Power Co.*, 18.

2. *Mandamus—Public Officers—Municipal Corporations—Unlawful Purposes.*—Performance of a mere ministerial duty on the part of a public official, when arbitrarily refused, may be enforced by mandamus and, under some conditions, the issuance of a building permit, under our statutes applicable, may come within the principle, but not for the performance of an unlawful act or one in furtherance of an unlawful purpose. *Refining Co. v. McKernan*, 314.

3. *Same—Gasoline—Oils—Governmental Powers.*—Police regulations as to the erection of structures for the only purpose of carrying on the business of selling and distributing kerosene oil and gasoline and other petroleum products is within the governmental powers ordinarily possessed by cities and towns. *Ibid.*

4. *Same—Building Inspectors—Ordinances—Defenses—When Available.*—A permit was requested of a city to erect structures therein to carry on the business of distributing and selling kerosene oil, gasoline, and other petroleum products, and pending investigation by the proper city authorities, a proceeding for mandamus to compel the issuance of the permit was brought against the building inspector, which was tried in the Superior Court, the judgment appealed from and remanded by the Supreme Court for further findings of fact as to the existence of certain ordinances relative to the inquiry, whereupon two ordinances passed by the proper city authorities forbidding, among other things, buildings of this character, "nearer than one thousand feet from any dwelling," etc., which forbid the erection of

MANDAMUS—*Continued.*

the structures at the proposed location, having been put in evidence and included in the findings of fact: *Held*, the ordinance was a valid one and thereunder the building of said structures at the place being unlawful, the mandamus must be denied on the second trial; and *Held further*, this defense was available to the city when brought to the attention of the court, though the ordinances had been passed since the institution of the suit. *Ibid.*

MANUFACTURE. See Intoxicating Liquors, 1.

MARRIAGE. See Register of Deeds, 1.

MARRIED WOMEN. See Husband and Wife, 9.

MASTER AND SERVANT. See Employer and Employee, 1, 3, 4, 6, 8, 10, 11; Negligence, 1, 11; Issues, 6; Insurance, 2; Courts, 12; Insurance, Accident, 1; Carriers of Goods, 10, 11; Contracts, 17; Evidence, 16, 20, 22.

MAYOR'S COURT. See Criminal Law, 1.

MEETINGS. See Municipal Corporations, 6.

MENTAL CAPACITY. See Deeds and Conveyances, 1; Appeal and Error, 26.

MERGER. See Contracts, 1, 11, 17; Corporations, 10.

MERITORIOUS DEFENSE. See Judgments, Set Aside, 1.

MILK. See Health, 4.

MINORS. See Judgments, 3.

MISDEMEANORS. See Torts, 1.

MONOPOLY. See Corporations, 2; Health, 1.

1. *Monopoly—Discrimination—Corporations—Public Service—Electricity—Hydroelectric—Courts—Jurisdiction.*—Where a public-service corporation has acquired, under a long-term contract with another company, the control over a large territory of the exclusive right to furnish hydroelectric power and light to municipalities, and to other public-service corporations, for distribution or retail to the consumers, including subsidiary companies that it owns or controls, it may not discriminate among its patrons under the same or substantially similar conditions as to the rate charged, or select its own customers, but the same, being affected with a public use, is subject to the control and jurisdiction of our courts. *Public Service Co. v. Power Co.*, 18.

2. *Monopoly— Hydroelectric Corporations — Public Utilities — Electricity Rates — Discrimination — Subsidiary Companies — Earnings — Mandamus.*—Where the owners of a public utilities corporation, for the generation of hydroelectric power, sell it to another company that they own or control, issue bonds for the purchase price to its full value, and issue additional stock to themselves, then enter into a long-term contract to supply the vendor company with hydroelectric power at a low rate, and have subsidiary companies which they supply at a certain rate, for retail or distribution among consumers,

MONOPOLY—*Continued.*

as also certain municipalities, within the territory under its control, it is required to supply such power to other public utility companies at the same and not a discriminatory rate, without reference to the rate such other company charges the consumers it supplies; and objection that the company is required to pay the interest on its bonds, running expenses, etc., out of its profits will not be considered when it appears, by demurrer, that the net earnings were more than sufficient. *Ibid.*

MOOT QUESTIONS. See Controversy Without Action, 2; Appeal and Error, 17; Contracts, 12.

MORTGAGES. See Taxation, 2; Corporations, 17; Appeal and Error, 12; Principal and Agent, 3; Nonsuit, 1; Corporations, 9; Evidence, 13.

Mortgages—Deeds in Trust—Power of Sale—Time of Sale—Notice—Statutes.—The time of sale of lands, under the power in a mortgage, must be in accordance with the notice thereof, as given or named in the advertisement and as required, so that there may be fair and competitive bidding, for otherwise the sale will be declared void. Rev., 641. *Ricks v. Brooks*, 205.

MOTIONS. See Divorce, 1; Appeal and Error, 10, 23; Judgments, 7, 9, 10, 14, 15; Pleadings, 5, 9; Removal of Causes, 2, 4; Parties, 4; Evidence, 20.

MOTIVE. See Intoxicating Liquors, 5.

MOTOR VEHICLES. See Taxation, 11, 12.

MULTIPLICITY OF SUITS. See Motions, 3.

MUNICIPAL CORPORATIONS. See Taxation, 2, 11, 12, 13, 14; Evidence, 30; Dedication, 1; Statutes, 2, 10; Mandamus, 2; Liens, 1; Elections, 2; Constitutional Law, 4, 5.

1. *Municipal Corporations—Cities and Towns—Streets—Plats—Dedication—Rights Inter Parties.*—As between the parties, when the owner of lands has had them platted, showing lots, parks, streets, and alleys, and with reference thereto has sold the lots, or one or more of them, the sale so made will constitute a dedication of the streets, etc., for public use, although not presently opened or accepted or used by the public. *Wittson v. Dowling*, 542.

2. *Same—Irrevocable Dedication—Estoppel—Equity.*—Where the owner of lands divides them into lots, showing thereon streets, etc., it amounts to an irrevocable dedication as it affects purchasers who have taken title to these lots with reference to the plat, the principle being dependent on the doctrine of equitable estoppel, giving such purchaser the right to have the division of the lands into lots, streets, etc., observed in its integrity. *Ibid.*

3. *Municipal Corporations—Cities and Towns—Streets—Dedication—Public—Acceptance.*—So far as a dedication by the owner of lands of streets, etc., platted therein by him concern the general public, without reference to the claims and equities of the individual purchasers of the lots, it is not complete until acceptance by formal action on the part of the properly constituted municipal authorities, or under

MUNICIPAL CORPORATIONS—*Continued.*

circumstances by user as of right on the part of the public, etc., but unless and until acceptance has been in some way legally established, it should be more properly termed an offer to dedicate on the part of the owner, and may be recalled by him before acceptance had, and usually is deemed to be recalled by deed in repudiation of the plat, and, at times, by deed from him conveying the land as an entirety without reference to the plat or any recognition of it, except as to the prior purchasers of the lots who have acquired an equitable right in the streets, which they do not relinquish. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Dedication—Proposed Dedication—Public—Acceptance—Inter Parties.*—The owner of lands had them platted into lots and streets, etc., and having sold several of these lots with reference to the plat, had the purchasers of the lots sold to properly release their equity in the streets, etc., and contracted to sell the balance to a third person who refused the title on the grounds that the vendor could not give title to the streets embraced or platted in the lands he had contracted to buy. No rights of the public in the streets by user or otherwise had been acquired, but, on the contrary, the proper municipal authorities had duly refused to accept the proposed dedication thereof: *Held*, the objection of the obligee to buy was untenable, and he will be required to accept the deed in accordance with his agreement of purchase. *Ibid.*

5. *Municipal Corporations—Cities and Towns—Bonds—Elections—Ordinances—Publication—Irregularities.*—The validity of municipal school bonds is not affected by the fact that the ordinance required that the validity of the resolution could only be questioned by action, etc., within thirty days from its *last* publication, when the statute authorizing the ordinance requires that its validity could only be questioned within thirty days after its *first* publication, there being no statutory requirement making the manner of publication essential to the validity of the bonds, or mandatory, and it appears that the election called for was fairly held, giving the voters full opportunity, and it resulted in a large majority vote in favor of the bonds. *Comrs. v. Malone*, 604.

6. *Municipal Corporations—Cities and Towns—Elections—Ordinances—Notice—Meetings.*—The validity of a municipal election in favor of school bonds may not be successfully attacked on the ground that an ordinance authorizing the election had not a full attendance of the board when nearly all of the members were present, and all had notice of the meeting and its purpose. *Ibid.*

7. *Municipal Corporations—Cities and Towns—Elections—School Bonds—Ordinances—Publication.*—Where a municipal ordinance calling for an election to vote upon the question of the issuance of school bonds has been published but once in a newspaper of wide circulation among the voters, instead of once a week for four successive weeks, provided by the statute, the statute does not make the validity of the bonds to depend upon the longer or more extensive publication, and the failure of compliance therewith does not affect the validity of the bonds, when every qualified person has cast his vote thereon, and the issue sustained by a large majority of those voting, without challenge. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

8. *Municipal Corporations—Cities and Towns—Ordinances—Publication—Actual Notice—Criminal Law.*—The requirement of the charter of a city or town that its ordinance shall be printed and published, is to bring it to the attention of the public, and where personal notice has been given to an offender thereunder who afterwards commits the offense prohibited, the requirement of publication, etc., is not necessary for a conviction. *S. v. Razook*, 708.

9. *Municipal Corporations—Cities and Towns—Ordinances—Certification—Evidence—Statutes.*—The certification of a town ordinance as required by Rev., 1595, is only *prima facie* evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the official records of the town by the proper officer, which shows its passage. *Ibid.*

10. *Municipal Corporations—Cities and Towns—Ordinances—Penalties—Statutes.*—The violation of a valid town ordinance is made a misdemeanor by Rev., 3702, and the defense that the ordinance did not prescribe a penalty therefor is untenable. *Ibid.*

MUNICIPALITIES. See Corporation Commission, 1.

MURDER. See Conspiracy, 2, 3, 4; Homicide, 2, 3, 4, 5, 6.

NEGLIGENCE. See Employer and Employee, 1, 3, 5, 6, 9, 11; Evidence, 6, 21; Railroads, 1, 2, 3, 5, 8, 9, 10, 11, 13, 14; Appeal and Error, 4; New Trials, 2; Drainage Districts, 1, 4; Bailment, 1; Judgments, 7; War, 1; Lessor and Lessee, 1; Waters, 1; Instructions, 5; Actions, 7, 8; Carriers of Goods, 7, 9, 11; Issues, 5.

1. *Negligence—Lessor and Lessee—Employer and Employee—Master and Servant—Contributory Negligence—Evidence—Nonsuit.*—Ordinarily a lessor is not liable to an employee or guest of his lessee for a personal injury caused by his failure to repair a defective place in the leased premises, though under contract with his tenant to repair: and where the employee was injured by stepping through a hole in a platform to an outside stairway, of which said employee was aware and had frequently theretofore stepped over, it is evidence of contributory negligence which will bar her recovery of damages in her action. And, *semble*, the court would have been justified in directing a nonsuit under the evidence in this case. *Jordan v. Miller*, 73.

2. *Negligence—Res Ipsa Loquitur—Presumptions—Admitted Facts—Railroads—Derailments.*—The doctrine of *res ipsa loquitur* from a derailment of a train, in a stock injury case, is inapplicable when it is not denied or controverted that the track and equipment, etc., were in good condition, and all the facts causing the accident are known. *Enloe v. R. R.*, 83.

3. *Negligence—Evidence—Nonsuit—Trials—Automobiles—Garage.*—Where the action is to recover damages to the plaintiff's automobile left with others in the defendant's public garage, and taken out by defendant's employees, but at night after his working hours, and injured, based upon the allegation that the defendant, at the time, was negligent in not properly safeguarding the garage, where the automobiles of others were kept, and there was evidence that the garage did not have an inner gate and the machine was taken when the watchman

NEGLIGENCE—*Continued.*

or another employee in charge had gone upstairs to close some windows: *Held*, a motion as of nonsuit upon the evidence was properly overruled. *Farrall v. Garage Co.*, 389.

4. *Negligence—Evidence—Subsequent Acts—Garage—Automobiles—Appeal and Error—Prejudicial Error—Trials.*—In an action by the owner of an automobile against the keeper of a public garage for not properly safeguarding machines left by the public therein, so that the automobile was taken out at night by a third person and injured, there was evidence that, at the time, the garage did not have an inner gate: *Held*, it was reversible error to admit evidence over the defendant's objection, that since then he had put in an inner gate, as such precaution would not be an admission of responsibility and would tend to create a prejudice in the minds of the jury; and does not fall within the exceptions to the rule as laid down in *Pearson v. Clay County*, 162 N. C., 224, and other like decisions. *Ibid.*

5. *Negligence—Measure of Damages—Cost of Repairs—Automobiles.*—Where the owner of an automobile brings action to recover damages of the owner of a public garage for negligently allowing his machine to be taken therefrom by a third person and injured, the measure of damages is the difference in the value of the machine before and after the occurrence, and not alone the expense necessary to put the machine back in the same condition, as nearly as possible, as it was in before it was injured, though the cost and expense of the repairs may be considered as evidence, in proper instances. *Ibid.*

6. *Negligence—Contributory Negligence—Evidence—Questions for Jury—Trials.*—Where there is evidence that a street car of the defendant street railway company negligently struck and injured a pedestrian along its track and injured him, and conflicting evidence as to whether he was in a place of safety and changed his position when it was too late for the defendant to have avoided the injury, a question of fact is presented upon the issue of contributory negligence for the determination of the jury. *Hodgin v. Public Service Corporation*, 449.

7. *Same—Torts—Joint Tort Feasors.*—Where the injury complained of is that the plaintiff, a pedestrian, was negligently struck by a moving street car of the defendant, and thrown in front of the codefendant's heavily loaded truck, and received a greater injury, and there is conflicting evidence of the negligence of each defendant: *Held*, if the negligence of both defendants was established and the plaintiff was not guilty of contributory negligence, the defendants were joint feasors and jointly and severally liable. *Ibid.*

8. *Negligence—Torts—Joint Tort Feasors—Instructions—Primary and Secondary Liability—New Trials—Appeal and Error.*—Where the evidence tends only to show that the two defendants sued for damages for negligence in inflicting a personal injury, where joint tort feasors, an instruction thereon relating to their primary and secondary liability is reversible error, but not requiring a new trial to be ordered when this issue may be stricken out without prejudice to the appellant. *Ibid.*

9. *Negligence—Evidence—Trials—Nonsuit—Questions for Jury.*—In this case it is *Held* that there was sufficient evidence for the determina-

NEGLIGENCE—*Continued.*

tion of the jury upon the issue of defendant's actionable negligence in causing a personal injury to the plaintiff, an employee, for failure of its duty to instruct him in the use of a power-driven machine, and to furnish him a machine that was known, approved, and in general use for like purposes, etc. *Miller v. Melton*, 467.

10. *Negligence—Evidence—Railroads—Carriers—Torts—Government Control—Statutes.*—In an action by an employee against a railroad for the defendant's negligence as the plaintiff was getting off its train, the evidence tended only to show that the plaintiff was employed to work with others as a carpenter at a Government camp, while the property of the carrier was under a lease from the Government, under the statute for war purposes, and that he rode daily on a shuttle train composed of cattle cars, to and from his work; that he was aware of the character of these cattle cars, and his foot slipped on a piece of steel at the door of one of them, usual in its construction, as he was getting off when the train was at a standstill for the usual place and purpose, and fell to his injury: *Held*, no evidence of the defendant's actionable negligence, but only of an unanticipated accident, and defendant's motion as of nonsuit thereon should have been granted. *Gilliam v. R. R.*, 509.

11. *Negligence—Evidence—Circumstantial Evidence—Conjecture—Reasonable Probability—Federal Employer's Liability Act—Employer and Employee—Master and Servant—Railroads.*—In an action against the carrier brought under the provisions of the Federal Employer's Liability Act, both under our State and Federal decisions, the carrier's negligence, upon which its liability depends, must be shown by affirmative proof; and that it was the proximate cause of the plaintiff's injuries, but this negligence may be established by circumstantial evidence when the relevant facts so shown are of such significance as to remove the case from the realm of conjecture and permit the inference of negligence as the more reasonable probability. *Lamb v. R. R.*, 619.

12. *Negligence—Invitee—Premises—Owner—Reasonably Safe Condition.*—One who invites another on his premises owes him the duty of keeping such of them as is covered by the invitation, including that close thereto, and upon which the invitee may be expected to casually go, in a reasonably safe condition so that he may not be subject to injury. *Ellington v. Ricks*, 686.

13. *Same—Explosives—Evidence—Questions for Jury—Nonsuit—Trials.*—The owner of the premises had contracted for the replacement of his old gasoline generator with a new one, which the seller was to install in a small brick house, where the old one had been used. There was evidence tending to show that the superintendent of the owner assumed to drain the old generator of gasoline and to move it from the brick house, and after he had placed it a short distance therefrom the owner called attention of the employee of the seller, doing the installation, to the old generator, and while he was examining it some gasoline left therein exploded to the injury of the seller's employee, for which he brings his action against the owner to recover damages: *Held*, it was for the determination of the jury as to whether the owner observed the care required of him to keep his

NEGLIGENCE—*Continued.*

premises in a reasonably safe condition, and a motion for judgment as of nonsuit was properly overruled. *Ibid.*

NEGLIGENT ORDERS. See Employer and Employee, 8.

NEGOTIABLE INSTRUMENTS. See Bills and Notes; Principal and Agent, 6; Evidence, 13.

NEW TRIALS. See Appeal and Error, 1, 7; Negligence, 8.

1. *New Trials—Issues—Appeal and Error.*—Where the prejudicial error committed by the Superior Court underlies or affects all the issues submitted to the jury, a new trial will be granted on all of them, and not confined to one or more of them in the discretion of the court. *Patton v. Lumber Co.*, 104.

2. *New Trials—Negligence—Release—Fraud—Undue Influence—Evidence—Trials.*—Where there is evidence tending to show that a release for damages for a personal injury, the subject of the action had been procured by the defendant from the plaintiff by fraud and undue influence, a holding that there was no evidence of this character by the trial judge constitutes reversible error. The Court does not discuss this evidence as a new trial is ordered. *Davis v. Lumber Co.*, 665.

NEXT FRIEND. See Judgments, 3.

NONRESIDENTS. See Courts, 2; Parties, 1; Summons, 4.

NONSUIT. See Appeal and Error, 13; Rape, 1; Evidence, 1, 5, 9, 15, 20, 26, 29, 30; Insurance, 5; Negligence, 1, 3, 9, 13; Slander, 2; Railroads, 1, 2, 9, 10; Bailment, 2; Summons, 6; Instructions, 7; Title, 3; Ejectment, 1; Insurance, Life, 6; Cities and Towns, 1; Intoxicating Liquors, 4; Pleadings, 15; Principal and Agent, 10.

Nonsuit—Pleadings—Evidence—Bills and Notes—Collateral—Equity Subrogation—Mortgages.—The plaintiff executed his note secured by mortgage, to a corporation in which the defendant was an officer, which was placed as collateral by the payee corporation to a note, endorsed by the defendant, given by the payee corporation to another, and, thereafter, the payee corporation obtained a renewal note from the plaintiff upon agreement that the first would be canceled. The maker corporation made several payments on its notes, among other things, with the proceeds of the sale of lands under plaintiff's mortgage, and the purchaser at the sale reconveyed the lands to the plaintiff, and in this suit the plaintiff seeks to enjoin the foreclosure of the second mortgage by the defendant officer of the maker corporation, who had then paid off the balance due on the note, and who held the collateral, including plaintiff's second note. There was evidence tending to show that defendant knew of the agreement between the plaintiff and his corporation, and plaintiff introduced a paragraph of the answer alleging the defendant was a transferee of the plaintiff's note "for value and without notice": *Held*, the case should have been submitted to the jury, there being evidence, notwithstanding the answer, that defendant was a purchaser with notice or knowledge; and, *Held further*, that the defendant, under the equitable doctrine of

NONSUIT—*Continued.*

subrogation, could have no further right than his corporation, as a holder of the plaintiff's note given in renewal. *Green v. Ruffin*, 345.

NOTES. See Insurance, Life, 2; Bills and Notes.

NOTICE. See Railroads, 14; Elections, 1; Arbitration, 1; Insurance, Life, 1, 6; Taxation, 3; Bills and Notes, 3; Lis Pendens, 1, 2; Carriers of Goods, 8; Principal and Agent, 6; Corporations, 5; Appeal and Error, 23; Municipal Corporations, 6, 8; Judgments, 13, 14; Landlord and Tenant, 8.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 3, 10, 11, 15, 19, 22, 25; Contracts, 7; Courts, 7; Evidence, 14; Pleadings, 15; State's Land, 2.

OCCUPATION. See Insurance, Accident, 1.

OFFENSES. See Indictment, 1; Criminal Law.

OFFICERS. See Dedication, 1; Bills and Notes, 2; Principal and Agent, 4; Lis Pendens, 1; Contracts to Convey, 1; Corporations, 6, 9.

OILS. See Mandamus, 3.

OPINION. See Cities and Towns, 3; Homicide, 4; Jurors, 1; Instructions, 4.

OPTIONS. See Contracts, 3, 5, 6, 8; Tenants in Common, 1.

ORDERS. See Removal of Causes, 1; Criminal Law, 5; Health, 4.

ORDINANCES. See Parties, 3; Mandamus, 4; Taxation, 11, 12, 13; Elections, 2; Health, 1, 2, 3; Municipal Corporations, 5, 6, 7, 8, 9, 10; Constitutional Law, 4, 5; Evidence, 30.

OWNER. See Negligence, 12.

OUSTER. See Tenants in Common, 5.

PARENT AND CHILD. See Habeas Corpus, 1; Wills, 3; Courts, 19, 20.

PAROL EVIDENCE. See Contracts, 1, 3, 17; Evidence, 11, 24; Deeds and Conveyances, 8, 9.

PAROL LEASE. See Landlord and Tenant, 6.

PAROL TRUSTS. See Trusts, 5.

PARTIES. See Actions, 3; Courts, 9; Judgments, 5; Eminent Domain, 3; Railroads, 7; Highways, 1; Corporation Commission, 1; Controversy Without Action, 2; Evidence, 10; Corporations, 15, 18, 19.

1. *Parties—Proceedings—Quasi in Rem—Courts—Jurisdiction—Nonresidents—Unknown Parties.*—Courts having jurisdiction in proceedings *quasi in rem*, by observing the statutory methods, have the power to make valid decrees affecting the status, condition, and ownership of real property, situated within the State, and, in proper instances, the same may be made effective both against nonresidents and persons unknown. *Bynum v. Bynum*, 14.

2. *Same—Partition—Tenants in Common—Summons—Publication—Sales—Purchaser—Title—Deeds and Conveyances—Judgments.*—Where, in special proceedings for the partition of lands among the deceased

PARTIES—*Continued.*

owners, it is properly made to appear that one of them has been missing for twenty years or more and cannot be found, nor can it be ascertained whether or not he had children or lineal descendants; that summons has been issued for him, returned not to be found, and then notice by publication had been duly published for him or his descendants without avail, Rev., 2490, and the interests of each of the parties has been duly ascertained and established; it is *Held*, under a motion to collect the purchase money under Rev., 1524, bid by a purchaser at sale for division, that such purchaser may not successfully resist payment on the ground of a defect in title for that the commissioner's deed would not preclude the claims of the missing heir or his heirs; but that the decree should provide for the reinvestment or security of the share of the missing party or his real representatives, Rev., 2546, which, however, in no wise affects the title to be conveyed. *Ibid.*

3. *Parties— Damages— Pleadings— Demurrer— Cities and Towns—Ordinances—Bridges—Railroads.*—In an action by a city to recover the extra cost of a bridge on its street across a railroad cut made necessary by the use thereof by a street railway company, the complaint alleged that the railroad company had built the bridge, and that under an existing ordinance each such company using the bridge should pay its proportionate cost, and demanded that it recover of the defendant street railway company the amount of the extra cost made necessary by its use of the bridge: *Held*, a demurrer was good on the ground that the railroad company, having built the bridge, evidently had paid the amount in suit, and therefore the city, the plaintiff in the action, could not recover it from defendant street railway company. *Raleigh v. Light Co.*, 380.

4. *Parties—Judgments Set Aside—Motions—Title—Husband and Wife.*—The devisee of the wife is a necessary party to proceedings to set aside judgments theretofore rendered in her favor against her husband, affecting the title to lands, which are the subject-matter of the devise. *White v. White*, 594.

PARTITION. See Parties, 2.

PARTNERSHIP. See Statutes, 7.

PAVING. See Liens, 1.

PAYMENT. See Insurance, Life, 1; Railroads, 7; Contracts, 12; Landlord and Tenant, 2; Pleadings, 14.

PENALTIES. See Taxation, 2; Usury, 2; Register of Deeds, 1; Municipal Corporations, 10.

PENDENCY. See Actions, 1.

PERFORMANCE. See Contracts, 6, 14.

PERSONALTY. See Taxation, 1, 4.

PHYSICIANS. See Abatement, 1; Torts, 2, 3.

PLATS. See Municipal Corporations, 1.

PLEADINGS. See Torts, 2; Estates, 1, 6; Lis Pendens, 1; Judgments, 4, 6, 8, 11; Actions, 1, 8; Summons, 1, 3, 7; Attachment, 2; Removal of Causes, 1, 4; State's Lands, 2; Seduction, 1; Nonsuit, 1; Parties, 3; Courts, 5; Evidence, 9, 29; Limitation of Actions, 3.

1. *Pleadings—Demurrer.*—A *demurrer ore tenus*, after answer filed, admits the allegations of the complaint, and if any part thereof is sufficient, construing liberally every reasonable intendment or presumption in favor of the pleader, the pleading will be sustained. *Public Service Co. v. Power Co.*, 17.

2. *Pleadings—Defense Bond—Answer Stricken Out—Notice to Show Cause—Judgments—Procedure.*—The procedure to strike out an answer and for judgment for the want of a defense bond, is upon a rule to show cause, and then if it is adjudged that such bond is required, the defendant should be given time for that purpose: and where the pleadings have been filed and no such bond had been given, and by agreement of the parties the case has been continued from one term of court to another, it is reversible error for the trial judge, during the latter part of the subsequent term, to enter judgment of the kind indicated without having followed the procedure stated. *Shepherd v. Shepherd*, 121.

3. *Same—Courts—Discretion—Waiver—Appeal and Error.*—Striking out an answer by the court for the want of a defense bond and rendering judgment against the defendant is not a discretionary matter with the Superior Court judge, where the defendant has been led to believe that the plaintiff has waived the bond, and such action is reviewable on appeal. *Ibid.*

4. *Pleadings—Allegations—Cause of Action—Defective Statements.*—There is a difference observed between the statement in a complaint of a defective cause of action, and a defective statement of a good cause of action, for in the latter, if there is no request to have the pleadings made more certain or definite and no demurrer, the defective statement may be waived or cured by the answer. *Ricks v. Brooks*, 205.

5. *Same—Appeal and Error—Motions—Statutes.*—Pleadings should be liberally construed to determine their effect, and with a view to substantial justice between the parties, and when it appears on appeal from a motion to dismiss, on the ground of the insufficiency of the complaint to allege a cause of action, that merely a good cause has been defectively stated, the action will not be dismissed in the Supreme Court on motion made there, but if necessary, an amendment will be allow to conform the pleadings to the facts proved, and the Court will disregard errors or defects in the pleadings or proceedings in the Superior Court, which are immaterial and where no statement may be waived or cured by the answer. *Ricks v. Brooks*, Rev., 407, 509. *Ibid.*

6. *Pleadings—Demurrer—Actions—Consideration.*—Where the judge sustains a demurrer to the complaint and dismisses the action for the lack of necessary parties who have pending in the same court separate actions against the same defendant involving substantially the same subject-matter, and thereupon properly grants the plaintiff's motion to consolidate all of these actions into one action, the granting of the motion to consolidate overrules the demurrer, and renders immaterial

PLEADINGS—*Continued.*

the question as to whether the demurrer was properly overruled, and under the circumstances of this case it is *Held*, that it was not necessary to dismiss the first action upon overruling the demurrer. *Ins. Co. v. R. R.*, 255.

7. *Pleadings—Amendments—Cause of Action.*—Amendments by the court to the complaint, and the bringing in of new parties, which merely broadens the scope of the action so as to take in the whole controversy for its settlement in one action, and made without substantial change in the action as originally constituted, do not change the original cause, but are within the contemplation of our statute, and may be allowed by the court. Rev., 414. *Ibid.*

8. *Pleadings—Interpretation—Refinements—Statutes.*—The ancient refinement of pleading more often defeated than promoted justice, and have long since been abolished by statute, Rev., 505, 507, 509, 512; and pleadings must now be liberally construed, disregarding mere form, to determine their effect. Rev., 495. *Aman v. R. R.*, 310.

9. *Pleadings—Justices' Courts—Summons—Demand—Motions—Bill of Particulars.*—In an action brought in a justice's court to recover against a railroad company damages for loss of a part of a shipment of goods, the summons is sufficient which includes, in the amount demanded, the freight the plaintiff had paid, in the expression "due by goods lost on company's road," as the freight paid would be as much a loss as the goods, especially when the defendant had had the itemized statement filed by the plaintiff for many months, and failed to ask for a more definite statement of the claim or for a bill of particulars. Rev., 494, 496. *Ibid.*

10. *Pleadings—Counterclaim—Independent Action—Lands—Title—Possession—Equity.*—Where the plaintiff alleges the ownership of several tracts of land in controversy and the defendant alleges that he is the owner and in possession thereof, without further allegations entitling him to any equitable relief, or claim amounting to a cloud upon his title, the answer does not raise a counterclaim requiring the plaintiff to reply, or entitling the defendant to a judgment for plaintiff's failure to have done so, the test of a counterclaim being whether the allegations are sufficient for the defendant to have maintained an independent action thereon. *Turner v. Livestock Co.*, 457.

11. *Pleadings—Interpretation of Verification.*—The verification to a complaint upon which judgment by default final for the want of an answer has been rendered, is not objectionable on the ground that it apparently shows that the plaintiff appeared before himself for the purpose, when by a proper perusal of the affidavit it will show that it followed the form approved and required by the statute and precedents, and was duly made before the clerk of the Superior Court in which the cause was pending. *Bostwick v. R. R.*, 486.

12. *Pleadings—Demurrer.*—A demurrer to a complaint is bad if the allegations therein, taken as true and interpreted in the light most favorable to the plaintiff, tend to establish a good cause of action. *Hodges v. R. R.*, 566.

13. *Pleadings—Contracts—Breach—Evidence—Admissions.*—The plaintiff brought action to recover certain lumber which he had cut on defend-

PLEADINGS—*Continued.*

ant's lands under contract, that he was to pay a certain price per thousand feet before removing it, alleging that he had paid therefor in two different lots, which the defendant generally denied, but further alleged specifically that the plaintiff had paid him for a certain number of feet, which appeared to be the sum total of the two lots of the plaintiff's allegation: *Held*, an admission of the pleadings that precludes the defense that the plaintiff had not paid for the lumber under the terms of the contract, and therefore was not entitled to recover it. *Morrison v. Walker*, 587.

14. *Pleadings—Contracts—Specific Performance—Actions—Defenses—Payment—Immaterial Matter.*—The plaintiff brought action to recover certain lumber that he alleged he was entitled to under a contract of purchase with the defendant requiring that he pay the defendant a certain price per thousand feet for it when he had cut it, before he removed it from the defendant's land; and the defendant alleged that the plaintiff had breached his contract in only cutting the most accessible timber, and not all of the timber on the lands, as the contract required: *Held*, it was not open for the defendant to show, under the pleadings, and without allegation, that the plaintiff had breached his contract by not having paid an insignificant part of the purchase price before attempting to remove the lumber from the defendant's land, of which both parties were then unaware, and which was not definitely ascertained until after the verdict. *Ibid.*

15. *Pleadings—Demurrer—Evidence—Nonsuit—Appeal and Error—Objections and Exceptions.*—Where the defendant has not demurred to the complaint or moved to make the allegations more definite, and proceeds with the trial upon evidence on a determinative issue, an objection to the complaint on the ground that its allegations failed to make out a case of actionable negligence is waived, and a motion for nonsuit must be considered and determined on the evidence relevant to the issue. *Lamb v. R. R.*, 620.

16. *Pleadings—Fraud—Allegations—Evidence.*—In an action to set aside a deed for fraud alleged to have been committed by defendant, evidence that another had committed the fraud while acting for the defendant is competent, when it appears that the defendant was not taken by surprise. *Cowan v. Cowan*, 695.

PLEAS. See Intoxicating Liquors, 3.

PLEAS IN BAR. See Cities, 1.

POLICE POWERS. See Statutes, 2.

POLICIES. See Insurance, 1, 2, 3, 4; Contracts, 11; Insurance, Life, 4.

POSSESSION. See Limitation of Actions, 1; Landlord and Tenant, 1; Title, 1; Pleadings, 10; Tenants in Common, 4, 5.

POWERS. See Statutes, 10.

PRAYERS FOR INSTRUCTION. See Instructions, 5, 7.

PREJUDICE. See Evidence, 3.

PREMIUMS. See Insurance, Life, 3.

PREMISES. See Negligence, 12.

PRESUMPTIONS. See Negligence, 2; Bills and Notes, 3; Fraud, 7; Title, 1; Evidence, 4; Husband and Wife, 8; Tenants in Common, 5.

PRINCIPAL AND AGENT. See Dedication, 1; Insurance, Life, 7; Drainage Districts, 1; Summons, 5; Lis Pendens, 1; Contracts to Convey, 1; Corporations, 11; Insurance, 5; Fraud, 7; Trusts, 1, 2, 4; Attorney and Client, 1; Evidence, 24.

1. *Principal and Agent—Sales—Commissions—Lease—Evidence—Questions for Jury—Trials.*—Where there is evidence tending to show that a real estate dealer was employed by the owner, as his agent, to negotiate with the United States Government to lease his hotel property to the Government for general hospital purposes, and that in pursuance thereof the lease was finally effected by the owner, in the absence of the agent but through his efforts, for a tuberculosis hospital, requiring the expenditure of money for alterations, etc., at a greatly increased and profitable rental; but that pending the negotiations the Government officials wrote that the property "would not meet any present need of the Department": *Held*, it was for the jury to determine, as to the commissions sued for by the real estate agent, and upon the evidence, whether the trade as finally consummated was within the agreement, or procured through his efforts, or whether the owner acted independently, after the agent had failed in effecting a separate lease, as originally contemplated. *Campbell v. Sloan*, 76.

2. *Principal and Agent—Sales—Commissions—Principal's Denial of Liability.*—Where a real estate agent has procured a lease of property for the owner, who accordingly consummates a deal in the agent's absence, but at a less price, the owner may not take advantage of the agent's services and, after making the lease, repudiate his liability for the commissions to which the agent is entitled. *Ibid.*

3. *Principal and Agent—Unauthorized Agent—Ratification—Acceptance of Benefits—Bills and Notes—Mortgages—Substitution of Property.*—The ratification of a transaction of a third person acting without authority as agent, may not be in part, for the repudiation thereof must be as a whole without acceptance of any of the benefits; and where the maker of a note secured by a chattel mortgage of mules has exchanged the mules for others in substitution of the mortgaged property, with a money payment to boot, and with knowledge thereof, the purchaser of the note accepts the cash thus paid, his so accepting the cash ratifies the entire transaction, for he may not repudiate it in part and ratify it in part. *Wilkins v. Welch*, 266.

4. *Principal and Agent—Corporations—Officers—Scope of Authority.*—A contract to convey land executed by the general manager of a corporation and apparently within the scope of his powers and in the line of the company's business, is *prima facie* binding on the company. *Morris v. Basnight*, 298.

4½. *Same—Benefits Accepted—Ratification.*—A corporation which has acquired the timber on the owner's land under an agreement made by him with its secretary and general manager to reconvey the land to him for a certain consideration, having knowingly accepted the benefit

PRINCIPAL AND AGENT—*Continued.*

thereof may not repudiate the authority of its officer, thus acting as its agent, and disaffirm the transaction. *Ibid.*

5. *Principal and Agent—Landlord and Tenant—Lessor and Lessee—Trusts.* Where the managing agent of a corporation conducting its business in leased premises, obtains a renewal of the lease from the owners in his own name, the lessor and the corporation, both believing he was acting only as agent in procuring the lease, he will be held, as a matter of law, trustee thereof for his principal. *Express Co. v. Pritchett*, 411.

6. *Principal and Agent—Bills and Notes—Negotiable Instruments—General Agent—Apparent Authority—Secret Limitations—Corporations—By-Laws—Shareholders—Notice.*—It is in the scope of the authority of the president of a corporation, in charge of its affairs, implied as agent from his official position and duties, to endorse or transfer notes given to it to purchasers thereof, and where a shareholder therein has become a purchaser of its negotiable notes before maturity, without notice and for a sufficient consideration and the notes have been endorsed or transferred to him by the president thereof, the mere fact that he was a shareholder therein does not fix him with notice that under its by-laws authorized by its charter, only the secretary and treasurer of the corporation was authorized to make the endorsement. *Cardwell v. Garrison*, 476.

7. *Same—Title—Purchasers for Value.*—A by-law of a corporation authorizing only its secretary and treasurer to endorse notes held by it to a purchaser is a secret limitation upon the implied or apparent powers of the president to do so, and does not affect the passing of the title to such instrument by the president's endorsement to a purchaser for value, before maturity and without actual notice, though such endorsee be a shareholder in the corporation at that time. *Ibid.*

8. *Same—Due Course.*—A shareholder in a corporation purchased a note held by it before maturity, for value and without actual notice of a by-law requiring that only its secretary and treasurer could make a valid endorsement, and accepted the transfer from its president, for which the company received the consideration or its greater part: *Held*, the purchaser is one in due course, and maintain his action against the makers of the notes and the secret limitation upon the apparent authority of the president of the corporation by its by-laws does not affect his title. *Ibid.*

9. *Principal and Agent—Revocation—Damages—Expenses—Value of Services Rendered—Quantum Meruit.*—The interest of the agent in a contract authorized by his principal which will prevent the revocation of the authority of the latter, must be in the subjectmatter of the power, and not merely relate to the agent's compensation for its execution; and where the principal contracts for the sale of his land by an agent, the latter to receive whatever he could get for the land over a certain price, and there is no covenant not to revoke, the former may at any time revoke the power before the completion of the deal, leaving the remedy of the latter, an action for damages for the expenses incurred by him, and reasonable compensation for the

PRINCIPAL AND AGENT—*Continued.*

worth of his services rendered before the revocation, and in the contemplation of the parties at the time of making the contract. *Real Estate Co. v. Sasser*, 497.

10. *Principal and Agent—Evidence—Scope of Agency—Benefits Accepted—Ratification—Trials—Nonsuit.*—Where there was evidence tending to show that the plaintiff, a shopkeeper, had, under contract with defendant's agent or superintendent, furnished for a year or more the employees of defendant merchandise from his store on the superintendent's order, with monthly statements thereof, which were paid promptly, excepting for the last statement, the subject of the action, which defendant refuses to pay on the ground of the lack of the superintendent's authority to make the contract as his agent; that the contract of agency was in writing and of limited authority, of which there is no evidence that the plaintiff had notice or knowledge: *Held*, sufficient to be submitted to the jury upon the question of the agent's express or implied authority, or of ratification of his acts by the defendant in knowingly accepting the benefits thereunder for such period of time, under the circumstances. *Hall v. Giessell*, 657.

PRINCIPAL AND SURETY. See Cities, 1; Evidence, 13.

PRIVILEGE. See Libel and Slander, 3.

PROBATE. See Husband and Wife, 8; Deeds and Conveyances, 7.

PROCEDURE. See Pleadings, 2; Removal of Causes, 2; Carriers of Goods, 10.

PROCEEDINGS. See Parties, 1.

PROCEEDINGS IN REM. See Constitutional Law, 2; Drainage Districts, 6.

PROCESS. See Summons, 1, 2, 7; Corporations, 11.

PROHIBITION. See Constitutional Law, 5; Intoxicating Liquors.

PROSTITUTION. See Criminal Law, 3.

PROXIMATE CAUSE. See Railroads, 4; Instructions, 6; Evidence, 22.

PUBLICATION. See Parties, 2; Appeal and Error, 7; Libel and Slander, 3; Summons, 2, 3, 4, 7, 9; Municipal Corporations, 5, 7, 8; Judgments, 13.

PUBLIC OFFICERS. See Mandamus, 2; Libel and Slander, 3.

PUBLIC SALES.

1. *Public Sales—Statutes—Lands—Executors and Administrators—Assets—Clerks of Court—Orders—Resales—Appeal—Courts—Jurisdiction—Evidence—Judgment—Sales.*—A proceeding to sell lands to make assets to pay the debts of the deceased, Rev., 723, is appealable from the clerk of the Superior Court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Rev., 610, 611, 612, 613, 614. *Perry v. Perry*, 445.

PUBLIC SALES—*Continued.*

2. *Same.*—The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person has sold them several times under resales ordered by the clerk of the Superior Court, and that the clerk has granted the purchaser's motion to confirm the sale after the lapse of more than twenty days from the last sale, without an advanced bid until after the expiration of that time, does not affect the jurisdiction of the judge on appeal to examine into the matter and order another resale upon being satisfied that justice and the rights of the parties require it. *Ibid.*

PUBLIC SERVICE. See Courts, 2; Monopoly, 1; Corporations, 1.

PUBLIC UTILITIES. See Mandamus, 1! Monopoly, 2.

PURCHASER. See Bills and Notes, 5; Parties, 2; Taxation, 2; Bills and Notes, 1; Judicial Sales, 1; Principal and Agent, 7; Eminent Domain, 2, 4.

QUANTUM MERUIT. See Principal and Agent, 9.

QUANTUM OF PROOF. See Libel and Slander, 4.

QUANTUM VALEBAT. See Attorney and Client, 1.

QUESTIONS. See Appeal and Error, 22; Witnesses, 1.

QUESTIONS OF FACT. See Conspiracy, 3.

QUESTIONS FOR JURY. See Employer and Employee, 2, 5, 6, 8, 10; Trials, 1; Insurance, Life, 3; Negligence, 6, 9; Judgments, 4; Principal and Agent, 1; Carriers of Goods, 3; Evidence, 4; Cities and Towns, 1; Libel and Slander, 2; Rape, 1; Conspiracy, 2; Constitutional Law, 5; Intoxicating Liquor, 1; Negligence, 13; Vendor and Purchaser, 2.

QUESTIONS OF LAW. See Judgments, 3; Register of Deeds, 1; Contracts, 15; Conspiracy, 3.

QUO WARRANTO. See Constitutional Law, 3.

RAILROADS. See Appeal and Error, 16; Negligence, 2, 10, 11; Taxation, 6; Employer and Employee, 6, 11; Statutes, 2; Corporation Commission, 1; Waters, 1; Parties, 3; Carriers of Goods, 1, 4, 6, 7, 9, 10, 11; War, 1; Eminent Domain, 1, 3, 4, 5; Evidence, 16.

1. *Railroads—Employer and Employee—Negligence—Personal Injury—Derailment—Evidence—Nonsuit—Trials—Master and Servant.*—The court will take judicial notice that a bull is an animal of a phlegmatic character not likely to be frightened or hastened in its movements by the ordinary signals of warning given by an approaching train; and where it is shown that the intestate of plaintiff, a fireman on the second engine of a double-header train, was thrown between the cab of the engine and the tender of his train by a derailment caused by running over a bull, the train moving about fifteen miles an hour, on a straight track about 300 or 400 yards from a curve in a cut the train had cleared; that a cow had just crossed the track, and the bull, quietly grazing 15 or 20 steps from the track, started to cross, running, when the train was 35 or 40 feet of the point of impact: *Held*, the mere fact that the whistle was not then blown,

RAILROADS—*Continued.*

under the circumstances, in so short a time, is not sufficient evidence of negligence to be submitted to the jury, and a motion as of nonsuit was properly allowed. *Enloe v. R. R.*, 83.

2. *Railroads—Derailment—Negligence—Evidence—Nonsuit—Trials.*—Upon evidence tending to show that while plaintiff, an employee of the defendant railroad, was riding with the defendant's superintendent on a hand or push car, recently repaired in the defendant's shop, the two front wheels "dropped on the track"; which the superintendent explained as a certain lack of proper repair, and that the car should be sent back to the shop; that further along on a trestle the same thing again occurred, throwing plaintiff to his injury: *Held*, the derailment of the car was in itself evidence of negligence, and taken with the other testimony as to the defective repair of the car, a motion as of nonsuit was properly disallowed. *Battle v. Cleave*, 112.

3. *Railroads—Excavations—Negligence—Cattle—Grazing—Rights of Way.* Where the roadbed of a railroad company runs through the farm lands of the owner of the fee, the company must use efforts to protect the cattle of the owner, who has the right to graze his cattle upon his own land and upon the right of way not used for railroad purposes, and the company is liable in damages for the killing of a mare belonging to the wife of the owner of the fee, by reason of the caving in of an embankment to a cut caused by its having been left in a negligent condition. *Howard v. Mfg. Co.*, 118.

4. *Same—Damages—Evidence—Proximate Cause.*—It is evidence that the cut of a railroad company has been left in an actionable negligent condition, when it tends to show that originally the embankment had the proper outward slope, but thereafter, in making a fill in another place, the company excavated the sides of the embankment so as to cause the top to overhang; and evidence that the wife of the owner of the fee had a horse which she grazed on her husband's lands, and one morning it was found injured and dead where the overhanging bank had caved in during the night, with hoof tracks above at the edge of the caved-in embankment, and on the dirt below, where the horse was found, a packed place as if something had fallen on it, etc., it is sufficient for the jury to find that the killing of the horse was caused by the defendant's negligence, and as a result which might reasonably have been anticipated. *Ibid.*

5. *Railroads—Lumber Roads—Fires—Negligence—Defective Locomotives—Sparks—Foul Right of Way—Evidence.*—Where the defendant's railway locomotive directly set fire to the plaintiff's lumber along its roadbed because of sparks from a defective spark arrester therein, or where sparks from its engine fell upon its foul right of way and set fire to the lumber, it is evidence of defendant's actionable negligence; and it is competent to show that the engine at the same place emitted many sparks immediately before and after the fire upon the question of defects therein. *Porter v. Lumber Co.*, 137.

6. *Railroads—Lumber Roads—Fires—Insurance—Evidence—Rebuttal Evidence.*—Where the plaintiff has had his lumber insured and seeks to recover damages against the defendant lumber company for negligently setting it afire, and defendant has introduced evidence tending to show that at the place the plaintiff was seen raking up trash

RAILROADS—*Continued.*

immediately before the fire, under suspicious circumstances indicating an attempt to burn the lumber, it is competent for the plaintiff either to explain or deny the inference that he was preparing to burn the lumber in order to obtain the insurance money. *Ibid.*

7. *Railroads—Lumber Roads—Fires—Insurance—Parties—Partial Loss—Payment—Equity—Judgment—Estoppel.*—Where plaintiff's complaint demands damages for the negligent burning of his lumber by sparks from defendant's locomotive, which lumber was partly covered by insurance, and the insurance company has been made a party plaintiff without objection, evidence that the insurance company has paid the loss covered by its policy is competent, and the insurer is equitably entitled to reimbursement. The defendant may not thereafter assign for error the making of the insurer a party, which will not be prejudicial to the defendant, when, by paying the judgment apportioning the recovery, the defendant will be fully protected. *Ibid.*

8. *Railroads—Negligence—Signals—Crossings—Collisions.*—The failure of the engineer on the locomotive of a railroad train to ring the bell or blow the whistle or give other warning as the fast moving train approached a grade crossing with a much used street in a populous town, where the approaching train was obscured from the view of those using the highways, is evidence of actionable negligence in an action to recover damages brought by one who was injured by a collision with the train while attempting to cross the track. *Goff v. R. R.*, 216.

9. *Railroads—Crossings—Signals—Evidence—"Look and Listen"—Contributory Negligence—Negligence—Nonsuit—Trials.*—Testimony of witnesses in circumstances and position to have heard the warnings given by whistle and bell, etc., of the locomotive of a train approaching a grade crossing, that they did not hear such warnings, is sufficient to sustain a verdict that they were not in fact given, and a judgment will be sustained in plaintiff's favor with this and with other evidence tending to show that the locomotive to defendant's train collided with the intestate's automobile and killed him, on a much used grade crossing in a populous town, where the approaches of the public road were narrowed by ditches, the view of the railroad track obstructed by trees, bushes, and houses so that the train could neither have been seen nor heard by the intestate, and the burden of proof being on defendant to show the contributory negligence in failing to observe proper care before going on the track, a motion for a judgment as of nonsuit is properly denied. *Ibid.*

10. *Railroads—Crossings—Collisions—Negligence—Contributory Negligence—Subsequent Negligence—Evidence—Nonsuit—Trials.*—Where there is evidence tending to show that the defendant's locomotive struck an automobile in which the plaintiff's intestate was crossing the railroad track at a grade crossed by a street in a city, and there is further evidence tending to show that the engineer did not know until after the impact he had carried the automobile some 250 or 300 yards, with the intestate therein, apparently alive and unharmed, and that his death was then caused by the automobile striking a signal post along the right of way, it is sufficient to take the case to the jury upon the question of the defendants negligence causing the death after

RAILROADS—*Continued.*

the collision at the crossing irrespective of the negligence of the defendant and contributory negligence of the intestate at that time, or previous thereto, and a motion as of nonsuit is properly overruled. *Ibid.*

11. *Railroads—Negligence—Damages—Fires—Foul Rights of Way—Instructions—Appeal and Error—Carriers.*—Where a railroad company is sought to be held liable for fire damage to land, and there is evidence tending to show that it was caused by a spark from the defendant's engine falling upon its foul right of way, the defendant's actionable negligence does not solely depend upon the condition of its locomotive or the manner in which it was being run at the time, but also upon the obligation of the defendant to keep its right of way clear from inflammable matter, and a charge to the jury which excludes this element of negligence is reversible error. *Denny v. R. R.*, 529.

12. *Same—Ordinary Care—Carriers.*—In an action to recover fire damage to land against a railroad company, involving the question of the defendant's negligence in not keeping its right of way clear of inflammable matter, a charge to the jury that the defendant would not be negligent if it exercise ordinary prudence in keeping, or attempting to keep, it so is objectionable as misleading, in failing to explain the defendant's duty and the meaning of the words "ordinary care" or "prudence," and permitting an inference that it was permissible for the defendant to let combustible matter accumulate thereon, to the danger of adjoining owners. *Ibid.*

13. *Railroads—Negligence—Evidence—Rebuttal—Burden of Proof—Instructions—Damages—Fires—Carriers.*—Where, in an action to recover damages against a railroad company for negligently setting out fire to the plaintiff's land, there is evidence, on the part of the plaintiff, that it was caused by a spark from the defendant's locomotive falling upon its foul right of way, it is incumbent upon the defendant to establish the fact, by the greater weight of the evidence, that it was not negligent in any of these respects upon which it relies; and this error cannot be cured by construing the charge as a whole, when not incorporated therein. *Ibid.*

14. *Railroads—Negligence—Damages—Fires—Foul Rights of Way—Acts of Another—Notice—Carriers.*—Where a fire has been communicated by a spark from defendant railroad company's locomotive to combustible matter on its right of way, causing damage to the plaintiff's land, it is not required that the defendant should have kept its right of way absolutely clear and clean of all inflammable matter to free itself of actionable negligence, if such matter had been placed there by another, for so short a time that the defendant had no notice thereof, express or implied, from length of time, or reasonable opportunity to remove it. *Ibid.*

15. *Railroads—Baggage—Negligence—Commerce—Damages—Federal Statutes.*—The limitation of recovery for the loss of baggage in interstate carriage of the passenger, by a regulation to that effect, duly filed and approved by the Interstate Commerce Commission is expressly reserved from the operation of the amendment to the Federal statute, 9 August, 1916, ch. 301, 39 St. L., and where a verdict has

RAILROADS—*Continued.*

been rendered in a sum in excess of one hundred dollars, it may be set aside and a judgment for the one hundred dollars entered, *non obstante veridicto. Culbreth v. Martin*, 678.

RAPE. See Indictment, 1.

Rape—Criminal Law—Evidence—Questions for Jury—Nonsuit—Trials.—*Held*, the evidence in this action of rape is sufficient to be submitted to the jury, but not discussed as a new trial is awarded. *S. v. Cline*, 703.

RATES. See Mandamus, 1; Monopoly, 2; Corporations, 3.

RATIFICATION. See Principal and Agent, 3, 4, 10; Evidence, 24.

REALTY. See Taxation, 1, 2.

REBUTTAL. See Fraud, 7; Evidence, 4; Railroads, 13.

RECEIPTS. See Fraud, 7.

RECEIVERS. See Corporations, 16, 19.

RECORD. See Appeal and Error, 28; Costs, 1; Evidence, 8.

REFERENCE. See Appeal and Error, 9, 20; Corporations, 6.

Reference—Evidence—Courts—Findings.—The trial judge may reverse the findings of fact of a referee upon evidence supporting his ruling as to essential facts, and affirm him as to others. *Caldwell v. Robinson*, 518.

REGISTER OF DEEDS.

1. *Register of Deeds—Marriage License—Statutes—Penalty—Uncontradicted Evidence—Questions of Law—Trials.*—Where the facts are not disputed in an action against a register of deeds to recover the penalty for his failure to make a reasonable enquiry as to impediments to a marriage for which application for license is made to him, Rev., 2090, the reasonableness of the enquiry may become a matter of law for the court. *Snipes v. Wood*, 349.

2. *Same—Reasonable Enquiry—Affidavit of Prospective Groom.*—It is not of a sufficient or reasonable enquiry, under the provisions of the Rev., 2090, as a matter of law, for the register of deeds to issue a marriage license for a woman under eighteen years of age without the consent of her father, being thirteen years old, upon the examination of the prospective bride and groom, whom he did not know and had never seen before, and a third person, whom he had seen a time or two, the first time about two weeks before, and whose character he did not know or enquire into, and erroneously assumed to be good, and that the woman was of the required age judging by her appearance; and the fact that he had required an affidavit from the prospective groom, and interested party, does not affect the result. *Ibid.*

REGISTRATION. See Landlord and Tenant, 8.

REHEARING.

1. *Rehearing—Second Rehearing—Appeal and Error.*—A party whose application for a rehearing of the case has been denied may not

REHEARING—*Continued.*

successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the court in reaching the same conclusion. *Moore v. Harkins*, 525.

2. *Same—Opposing Party.*—Where a petition to rehear a case in the Supreme Court has been allowed, the opposing party only may petition for a second rehearing thereof. *Ibid.*

3. *Rehearing—Court's Discretion—Rules of Court—Appeal and Error.*—Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. Rule 53. *Ibid.*

RELEASE. See Estates, 1; Evidence, 13; New Trials, 2.

REMAINDERS. See Estates, 1, 2, 3, 4, 5, 9; Wills, 1, 3.

REMAND. See Appeal and Error, 34.

REMARKS OF COURT. See Appeal and Error, 26.

REMOVAL OF CAUSES. See Divorce, 1; Cities, 1.

1. *Removal of Causes—Transfer of Causes—Pleadings—Clerks of Court—Time to Plead—Application for Extension of Time—Orders.*—The clerk of the Superior Court in which an action has been commenced has authority, upon request of the defendant, to extend the time for filing the answer beyond the twenty days allowed by the statute, Public Laws of 1919, ch. 304, but he may not, of his own motion, extend the time without the defendant's consent, beyond that requested, and bar him of his right to move the cause to another county when his motion is made before answer filed within the twenty days allowed him from the filing of the complaint, though under a misapprehension as to the statutory time he has requested the clerk to allow him two weeks in which to file his answer, the time to which he is entitled by the statute. *Lumber Co. v. Arnold*, 269.

2. *Same—Motions—Courts—Terms—Procedure.*—Public Laws of 1919, ch. 304, confers no power upon the clerk of the Superior Court to hear and determine a motion to remove a cause to another county, and this must be done before the judge in term; and where the defendant has filed his motion to remove the cause before the clerk, and afterwards filed his answer within the statutory time, the motion is made in time, and the case should be transferred to the Superior Court for a hearing of the motion before the court in term. *Ibid.*

3. *Same—Arguments—Admissions.*—Where a defendant has acted within the time allowed him by law to file his motion to change the venue of the action, and it appears that he has requested the clerk of the Superior Court for an extension of two weeks from the filing of the complaint in which to answer under a misapprehension of the statutory time allowed by ch. 304, Public Laws of 1919, the extension of time by the clerk beyond that requested is not upon his application, and the failure of the defendant to specially controvert this upon the argument will not deprive him of his right. *Ibid.*

4. *Removal of Causes—Transfer of Causes—Motions—Clerks of Court—Pleadings—Answer—Superior Court—Jurisdiction.*—Where proceedings are commenced by the issuance of a summons by a nonresident

REMOVAL OF CAUSES—*Continued.*

plaintiff in the wrong venue, before the clerk of the court, ch. 304. Acts 1919, the defendant may file his motion before the clerk before time to answer has expired, and thereafter file his answer, when the cause will be transferred to term; and the motion to remove then being properly before the judge, he has jurisdiction and authority to pass thereon, and order the cause transferred to the proper venue. *Zucker v. Oettinger*, 277.

RENTS. See Lessor and Lessee, 3; Landlord and Tenant, 2, 3, 5.

REPAIR. See Employer and Employee, 3; Landlord and Tenant, 3, 5.

REPEAL. See Statutes, 10.

REPLEVIN. See Contracts, 4.

REPRESENTATIONS. See Insurance, Life, 5.

RESALES. See Public Sales, 1.

RESERVATION OF RIGHTS. See Courts, 10.

RES IPSA LOQUITUR. See Negligence, 2; Bailment, 2; Evidence, 17.

RESTAURANTS. See Sunday, 1.

RESTITUTION. See Alimony, 1.

REVISAL.

SEC.

195. This section does not create a presumption in favor of either party in an action to recover lands, and applies only when the State is a party or a protested entry to obtain a grant. *Moore v. Miller*, 396.

177. Adopting an illegitimate child by ulterior remainderman does not fill the condition of a devise that he have "heirs lawfully begotten." *Love v. Love*, 115.

263-4. A devise upon the contingency that the ulterior remainderman die leaving "heirs lawfully begotten" is not fulfilled by his leaving an illegitimate child, though legitimated under these sections, or adopted, Rev., 177. *Ibid.*

385. In actions to recover lands falling without the exceptions of Rev., 195, where plaintiff has failed to show title in himself, the action should be dismissed, without adjudication in defendant's favor. *Moore v. Miller*, 396.

386. The presumption of possession and occupation of lands exists only for the claimant who has shown a legal title. *Ibid.*

395 (2). Paving liens rest only by statute, and are *in rem*. *Morganton v. Avery*, 551.

396. Continuous renewals by the bank of depositor's papers, substituting some for others and receiving the money collected by the depositor on them are mutual running accounts, and is only barred by the statute for usury two years after the last item. *Lumber Co. v. Trust Co.*, 211.

407. Immaterial or unprejudicial amendments to pleadings may be allowed to make them conform to the evidence. *Ricks v. Brooks*, 204.

REVISAL—*Continued.*

SEC.

409. Actions of several insurance companies against a railroad for negligently destroying insured's property by fire, covered by the several policies, are properly united, with amendments allowed to make pleadings conform when the plaintiffs have paid under their insurance contract, etc. *Ins. Co. v. R. R.*, 255.

423. This section, relating to venue of actions against foreign corporations, does not restrict jurisdiction in transitory causes of action. *Ledford v. Tel. Co.*, 64.

414. The original cause of action is not changed by amendments that only broaden its scope. *Ins. Co., v. R. R.*, 255.

440. A foreign express company, while a member of the Federal Government Control Act, a war measure, does not fall within the provision of this section as to local process agent. *McAlister v. Express Co.*, 556.

442 (4), (5). Upon the facts here, summons by publication in divorce proceedings by wife was proper, and wife may recover her money spent by her husband to purchase lands to which title was taken in his own name. Courts may decree sale. *White v. White*, 592.

445. Attachment is not necessary to a sale of lands here of nonresident husband, subject to alimony allowed the wife *pendente lite*. *Ibid.*

462. The principle of *lis pendens* is not applicable to a buyer from a litigant with full notice. *Morris v. Basnight*, 298.

469. See Notation to sec. 409, *ante*.

474 (3). Complaint alleging pendency of the same action, on the same subject, between the same parties, is demurrable. *Allen v. Salley*, 147.

477. Objection where same cause between the same parties is pending in another county, may be taken by answer. *Ibid.*

481. Objection to a second action for tort in a different county is by way of counterclaim. *Ibid.*

494-496. Claim against railroad for damages for loss "due by goods lost on company's road," a carrier, is held sufficient under the facts. Defendant should have asked for a more definite statement, or bill of particulars. *Aman v. R. R.*, 310.

495. Pleadings liberally construed to determine effect. *Ibid.*

505-7-9. Refinements in pleadings abolished by statute. *Ibid.*

509. Immaterial or unprejudicial amendments to pleadings may be allowed to make them conform to the evidence. *Ricks v. Brooks*, 204.

513. Judgments irregularly entered may be set aside within a reasonable time, the statutory twelve months applying when they are entered in the due course and practice of the court. *Bostwick v. R. R.*, 485.

535. Upon evidence tending to show that one dealt with agent with knowledge of his limited authority, an instruction disregarding it was erroneous. *Mfg. Co., v. McPhail*, 383.

REVISAL—*Continued.*

SEC.

539. The plaintiff must recover lands upon the strength of his own title, or nonsuited. *Moore v. Miller*, 396.

556. Where the damages are certain by agreement of the parties, or can be made certain by computation, judgment by default final may be entered, an enquiry being necessary when they are uncertain. *Bostwick v. R. R.*, 485.

563 (2). The facts that different relief and counterclaim may be set out in a second action in a different county does not affect the fact that one judgment may be rendered, or prevent dismissal of second action. *Allen v. Salley*, 147.

610-11-12-13-14. These sections apply to appeal from order of clerk to sell lands of decedent to pay debts. Rev., 723. *Perry v. Perry*, 445.

627-28. Courts cannot try title in contest for seats in the Legislature. *S. v. Pharr*, 699.

641. Sales under power in a mortgage must be made according to advertisement of time and place. *Ricks v. Brooks*, 204.

655. Trustee in bankruptcy may recover, as for betterments, the value of improvements put by the bankrupt upon lands of another, in fraud of creditors' rights. *Garland v. Arrowood*, 697.

723. Order of clerk to sell lands to pay decedent's debt is appealable to the Superior Court for further orders or decrees to be heard and decided upon additional evidence. *Perry v. Perry*, 445.

795. Where there is no allegation in claim and delivery for damages for detention of mules, plaintiff's damage is the difference between their ascertained value, and interest. *Burger v. Cooper*, 140.

948. Description of land in this case held sufficient to admit of parol evidence of identification. *Timber Co. v. Yarbrough*, 335.

952. A power of attorney from a married woman to convey lands not executed in conformity with the statute is void, and his conveyance passes no title. *Adderholt v. Lowman*, 547.

980. Lease of lands for three years or more must be registered as to third parties, and a parol lease for such duration cannot be held as notice to them. *Mauney v. Norvell*, 628.

976. A lease of land, by parol, for more than three years from the time it was made, and not from the time of its commencement, is void, and acceptance of monthly rental, when due, will not make it otherwise. *Ibid.*

976. A contract to convey grantor's "entire tract or boundary, consisting of 146 acres," is sufficient to admit parol evidence, and when established is capable of specific performance. *Norton v. Smith*, 553.

1054. The Corporation Commission may permit a public-service corporation to raise its rates beyond a charter restriction when necessary to enable the corporation to perform its public duties. Any party affected by the order may appeal, but rates established remain unchanged until modified, etc. *In re Utilities Co.*, 151.

REVISAL—*Continued.*

SEC.

1196. Section not affected by ch. 147, Laws 1913, relating to ownership of stock in corporations, or failing to earn dividends, etc. *Lashley v. Mercantile Co.*, 574.

1463. Pleadings in justices' courts may not be quashed or set aside for want of form. *Aman v. R. R.*, 310.

1467. Pleadings in justice's court are sufficient if a person of common understanding may know what is meant. *Ibid.*

1467. In furtherance of justice the courts are given ample power to permit amendments at any time before or after judgment, as to form, etc. *Ibid.*

1509. Plaintiff must show fraud when relied on in his suit to remove cloud from title only by the preponderance of the evidence. *Ricks v. Brooks*, 204.

1524. Where purchaser of land held in common may not question title on the ground heirs of deceased owner would not be precluded, after summons returned "not to be found," etc., and advertising process. *Bynum v. Bynum*, 14.

1559. Venue in divorce proceedings not jurisdictional and may be waived. Remedy is by motion to remove. *Davis v. Davis*, 185.

1564. The statutory denial of allegations for divorce does not deprive defendant of right to answer in twenty days, and judgment may be set aside upon motion without findings of meritorious defense. *Campbell v. Campbell*, 413.

1566. Notice of wife's application to sell lands purchased by husband with her money, is not necessary when husband, in divorce proceedings, is a nonresident, and the lands are subject to alimony adjudged. *White v. White*, 592.

1589. Where the son falsely represented to his mother that his action to annul proceedings to lay out her dower had been withdrawn, the mother may maintain her action to set aside an adverse judgment to her therein, for fraud. *Stocks v. Stocks*, 285.

1590. Under the allegations in this case for sale of land affected with contingent interests, a demurrer held bad. A private sale of land may be ordered. *Middleton v. Rigsbee*, 437. See notations under sec. 2490.

1591. Section for benefit of borrower, who may waive his right thereunder. *Ector v. Osborne*, 667.

1605. Description of land in this case held sufficient to admit of parol evidence of identification. *Aman v. R. R.*, 310.

1935. Liability of lessor of wharf not affected under his covenant to maintain, and which was damaged or destroyed by breaking up of ice on the water. *Chambers v. North River Line*, 199.

1741. Secretary of State has no authority to correct State's grant in substituting a different patentee. *Herbert v. Development Co.*, 662.

1992. Excludes "agreements respecting repairs." *Chambers v. North River Line*, 199.

REVISAL—*Continued.*

SEC.

1992. This modifies and is in recognition of the common-law liability of the lessee for the agreed rent when the leased premises has been destroyed, during the term, by fire; where the landlord is under no obligation, but enters and rebuilds another and better store, the new building comes within the terms of the lease. In this case, *Held*, the lessee's duties to repair and to pay rent are independent obligations. *Mills v. Walker*, 489.

2008. Tenant remaining in possession under a lease held to be void under the statute, is required to give bond on appeal. *Mauney v. Norvell*, 628.

2090. The reasonableness of the inquiry of register of deeds as to the age of prospective bride becomes a matter of law upon admitted facts, and in this case it is held as insufficient. *Snipes v. Wood*, 349.

2107. The probate officer's certificate that wife's deed to her husband of her lands is "not unreasonable or injurious to her" is, without a statement of facts, an irrebuttable conclusion, and stands in the absence of fraud, etc. *Frisbee v. Cole*, 469.

2490. After notice of partition proceedings followed by publication in certain instances for division among tenants in common, purchaser of deceased tenant's interest at the sale may not question title on ground it would not preclude missing heirs, etc. *Bynum v. Bynum*, 14.

2546. Where land of tenants in common has been sold, after advertisement of summons for heirs of deceased owner, the interest of such should be ordered reinvested for them; but this does not affect title. *Ibid.*

2772. The maker must establish his defense of lack of consideration in action on his note, and his mere conclusion is insufficient. *Bank v. Andrews*, 341.

2866. Owner of lands sold for State and county tax may not resist paying the 20 per cent penalty to the holder of certificate by tendering amount of the tax and 6 per cent interest, under certain conditions. *Cherokee v. McClelland*, 127.

2868. The holder of certificate of sale of land for State and county tax may enforce his lien by sale in the proper county in analogy to foreclosure of mortgage. *Ibid.*

2889. Holder of certificate of purchase of lands sold for State and county taxes, after statutory notice to owner, is entitled to the 20 per cent penalty allowed. *Ibid.*

2912. Owner of lands sold for State and county tax may not resist paying the 20 per cent penalty, by tendering amount of the tax and 6 per cent interest, under certain conditions. *Ibid.*

2967. Full thirty-day notice of time and place election for road bonds not necessarily required to be made. *Comrs. v. Malone*, 10.

3140. A conveyance to daughter for life, and should she die leaving no child, then to her husband, the wife takes a contingent interest under the will of her deceased husband, the contingency not having then happened. *Hollowell v. Manly*, 262.

REVISAL—*Continued.*

SEC.

3265a (Greg. Supp.). Keeping open a restaurant on Sunday, though denominated a "weiner joint" by some of the witnesses, is not prohibited, and a nonsuit on the evidence in this case should have been entered. *S. v. Shoaf*, 744.

3269. A charge of accessory before the facts includes that of the principal crime. *S. v. Simons*, 700.

3702. An ordinance making its violation a misdemeanor prescribes a penalty. *S. v. Razook*, 708.

3740 (7). A sentence of twelve months for vagrancy is not authorized. It is within the discretion of the Superior Court to allow amendment specifying particular act of vagrancy charged. *S. v. Walker*, 760.

3845. Cutting of telephone wire is a tort making the tort feasor responsible for injury caused thereby to another, irrespective of contractual relations. *Hodges v. R. R.*, 566.

4305. Township road bonds will not be declared invalid merely because of lack of advertisement for full twenty-day period. *Comrs. v. Malone*, 10.

4760. Insurance companies having paid the loss are subrogated to the rights of the insured, and may sue *tort feasor*, making the insured, the holder of the legal title, a party. *Ins. Co. v. R. R.*, 255.

4794-5. Statements of applicant for insurance in fraternal benefit associations are deemed representations and not warranties. *Gay v. Woodmen*, 210.

4808. Statements of applicant for insurance in fraternal benefit associations are deemed representations and not warranties. *Ibid.*

REVOCATION. See Arbitration, 1; Principal and Agent, 9.

RIGHTS OF WAY. See Railroads, 3, 11, 14; Eminent Domain, 1.

RISKS. See Insurance, Accident, 1.

ROAD COMMISSIONERS. See Counties, 1.

ROADS AND HIGHWAYS. See Appeal and Error, 11.

RULE IN SHELLEY'S CASE. See Deeds and Conveyances, 3.

RULES OF COURT. See Costs, 1; Rehearing, 3.

SAFE PLACE TO WORK. See Employer and Employee, 1, 3, 4, 8; Courts, 12.

SAFE TOOLS. See Employer and Employee, 8.

SALE OF MILK. See Health, 1.

SALES. See Estates, 1, 6, 7, 10; Public Sales, 1; Parties, 2; Corporations, 15, 18; Principal and Agent, 1, 2; Intoxicating Liquors, 2, 3, 4; Taxation, 1, 2; Mortgages, 1; Contracts, 10; Judicial Sales, 10; Tenants in Common, 4; Alimony, 2.

SCHOOL DISTRICTS.

1. *School District—Bonds—Statutes—Specified Purposes—"Equipment"—Surplusage—Implied Powers.*—Where a statute authorizes a county

SCHOOL DISTRICTS—*Continued.*

to call an election upon the petition of a certain per cent of the voters of a school district therein for the issuance of bonds therefor, with provision for interest thereon and a fund for retiring the bonds at maturity, etc., and specifies the purposes therefor, for "repairing, altering, making additions to or erecting new buildings, or for purchasing schoolhouse sites or playgrounds," etc., and a petition from the required number of voters is presented adding to the specifications of the statute, the word "equipment" for new buildings, the commissioners order the election and publish notices thereof accordingly, but refer to the statute and it is stated in the petition, order for the election, and notices that it is in pursuance of the statute, designating it: *Held*, the addition of the word "equipment" is not a jurisdictional averment in its effect, and where the other requirements of the statute are followed, the bonds will not be declared not valid solely on that account, and, *semble*, the necessary equipment for the use of such buildings, fastened thereto, and fixtures therein, such as desks, etc., will not be regarded as a substantial departure from the purposes of the statute. *Comrs. v. Malone*, 110.

2. *School Districts— Schools— Buildings—Equipment—Statutes—Bonds.*— Legislative authority to a school district to issue bonds to erect a school building or buildings for the accommodation of the public schools therein, includes the power to provide the ordinary equipment. *Commissioners v. Malone*, 110. *Trustees v. Pruden*, 617.

3. *Same—Taxation—Interest—Sinking Fund.*—Where a statute authorizes a school district to issue bonds to erect a school building or buildings, with provision for a special tax to pay the interest thereon "and to create a sinking fund sufficient to retire said bonds at their maturity," the provisions of the statute would control those of an ordinance limiting the amount, assuredly if the bonds were in the hands of an innocent purchaser for value; and were it otherwise, the validity of the bonds would not be affected under the principle applied in *Comrs. v. McDonald*, 148 N. C., 125. *Ibid.*

SCOPE OF INQUIRY. See Judgments, 1.

SCHOOLS. See Elections, 3; Municipal Corporations, 7; School Districts, 2.

SECRET LIMITATIONS. See Principal and Agent, 6.

SEDUCTION.

Seduction—Force—Pleadings—Allegations—Issues.—In an action by the father for seduction of his infant daughter, 16 years of age, upon allegation that the defendant "did seduce, debauch, and violently force the plaintiff, and had sexual intercourse with her against her will," two issues were submitted, (1) Did the defendant unlawfully and forcibly assault and carnally know and abuse the plaintiff as alleged? and (2) Did he wrongfully seduce and carnally know the plaintiff as alleged? *Held*, the issues were proper and an affirmative verdict upon either would have been legal, and the defendant cannot complain of a negative finding upon the first, acquitting him of civil liability for a capital charge, with an affirmative verdict upon the second issue. *Tillotson v. Currin*, 176 N. C., 481, cited and applied. *Fields v. Brinson*, 280.

SECRETARY OF STATE. See State's Lands, 1.

SEPARATE PROPERTY. See Husband and Wife, 9.

SELF-DEFENSE. See Homicide, 2.

SENTENCE. See Appeal and Error, 34; Criminal Law, 3.

SERVICE. See Summons, 2, 3, 5, 7, 9; Actions, 4; Corporations, 11.

SETTLEMENT. See Insurance, 5.

SEWERAGE. See Cities and Towns, 1.

SHARES OF STOCK. See Taxation, 9.

SHAREHOLDER. See Taxation, 7; Principal and Agent, 6; Corporations, 5, 14, 19.

SIDEWALKS. See Cities and Towns, 1; Liens, 1.

SIGNALS. See Railroads, 8, 9.

SINKING FUND. See School Districts, 3.

SITUS. See Taxation, 8.

SLANDER. See Libel and Slander.

Slander—Inferior Courts—Justices of the Peace—Committing Magistrates —Indictment—Statutes.—Where a local statute has established an inferior county court, declaring slander and certain other offenses committed to its jurisdiction petty misdemeanors, and provides that the same may be trial by the warrant of a justice of the peace acting as a committing magistrate, and also conferring authority on the judge of the inferior court to transfer any and all causes to the Superior Court of that county for trial, and the judge of the county court, being interested in the newspaper publishing the libel, has without objection referred the action, brought in the justice's court, to the Superior Court for trial, without himself trying the matter: *Held*, no bill of indictment is required, and objection to the jurisdiction of the Superior Court will not be sustained. *S. v. Publishing Co.*, 721.

SOLICITOR. See Criminal Law, 1.

SOLVENCY. See Corporations, 11.

SPECIAL REQUESTS. See Instructions, 12.

SPECIFIC PERFORMANCE. See Contracts, 5, 6, 9; Contracts to Convey, 1; Issues, 2, 5; Husband and Wife, 9; Pleadings, 14; Deeds and Conveyances, 8.

SPIRITUOUS LIQUORS. See Intoxicating Liquors, 2, 3, 4, 5.

STATEMENTS. See Pleadings, 4; Homicide, 3.

STATE'S LAND.

1. *State's Land—Grants—Secretary of State—Statutes—Change of Grantee.*—The power conferred upon the Secretary of State by ch. 460, Laws of 1889, now Rev., 1741, to correct errors in grants of State's

STATE'S LAND—*Continued.*

land, by supplying omissions, or correcting the names of grantees, material words or figures, etc., confers on him only a ministerial authority and not a judicial power, which is vested in the courts by our Constitution, Art. IV, sec. 2; and his change of the name in the grant from one person to another, by name, is in effect to declare the former a trustee of the latter, or his heirs at law, under a grant obtained by fraud or mistake, etc., and within the exclusive jurisdiction of the courts, and the action of the Secretary of State therein is void. *Herbert v. Development Co.*, 662.

2. *Same—Deeds and Conveyances—Trials—Pleadings—Evidence—Appeal and Error—Objections and Exceptions.*—Where in an action involving title to lands, the defense, throughout the trial, is the validity of a State's grant under which the defendant claims, and there is also allegation denied, that the title had been conveyed to him by the plaintiff, but the deed, etc., was not put in evidence and his motion to nonsuit has been erroneously sustained by the trial judge solely upon the ground that the grant under which he claimed was a valid one, and on appeal the defendant has assigned no error therein: *Held*, the Superior Court could not have determined the question of the defendant's title under the deed of plaintiff, as alleged; and a new trial will be ordered for the error of the judge in sustaining as valid the grant, the source of defendant's title. *Ibid.*

STATE'S TITLE. See Title, 2.

STATUTE OF FRAUDS. See Deeds and Conveyances, 8, 9; Landlord and Tenant, 6.

STATUTES. See Counties, 2; Courts, 3, 5, 14, 15, 16, 22; Actions, 1, 3; Highways, 1, 2; Insurance, Life, 1; Insurance, Fire, 1; School Districts, 1; Negligence, 10; Taxation, 1, 2, 8, 10; Evidence, 20; Wills, 3; School Districts, 2; Contracts, 4; Summons, 5, 7, 9; Bills and Notes, 3; Controversy Without Action, 1; Register of Deeds, 1; Usury, 2, 3; Mortgages, 1; Pleadings, 5, 8; Lessor and Lessee, 2; Drainage Districts, 5, 6; Lis Pendens, 2; Carriers of Goods, 2; State's Lands, 1; Deeds and Conveyances, 6, 8; Slander, 1; Corporations, 2, 13, 14, 16; Ejectment, 1; Public Sales, 1; Estates, 6; Title, 1; War, 1; Sunday, 1; Eminent Domain, 1; Torts, 1; Husband and Wife, 8, 9; Judgments, 9, 10, 12, 13, 14; Landlord and Tenant, 2, 6; Tenants in Common, 3; Liens, 1; Alimony, 2; Elections, 2, 3; Appeal and Error, 29, 34; Attachment, 3; Bankruptcy, 1; Conspiracy, 4; Constitutional Law, 3; Criminal Law, 3; Health, 1, 2, 3; Instructions, 11; Intoxicating Liquor, 2, 5; Issues, 6; Limitation of Actions, 3; Municipal Corporations, 9, 10; Railroads, 15; Superior Courts, 1.

1. *Statutes—Other States—Decisions—Adopted Here—Interpretation.*—Where a statute law of another State is afterwards enacted here, and the language has received a settled construction there, the Legislature will be presumed to have adopted it with the intention that it shall receive that interpretation. *Ledford v. Tel. Co.*, 64.

2. *Statutes—Police Powers—Municipal Corporations—Cities and Towns—Railroads—Street Railways—Passenger Fares—Contracts—Private Rights—Constitutional Law—Carriers of Passengers.*—The Legislature, either directly or through appropriate governmental agencies,

STATUTES—*Continued.*

has the power to establish reasonable regulations for public-service corporations in matters affecting the public interest; and where such corporations have devoted their property to the public use and are operating under a legislative charter and exercising the right of eminent domain therein conferred, they are, in a peculiar sense, subject to the police power of the State conferring it, to which, when properly exerted in reference to these companies, the proprietary rights of individual ownership must, to that extent, be subordinated to the public welfare. *In re Utilities Co.*, 151.

3. *Same—Corporation Commission.*—A corporation commission is created under the provisions of our statute, Rev., 1054, *et seq.* (ch. 20), giving it general supervision over railways, street railways, and like companies of the State, and empowering it to fix such rates, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these being police powers delegated to this commission, governmental so far as they extend, a public service street railway company, operating under a city charter, and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized in conformity with the act, to raise its charges to its passengers, when in the opinion of the commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. *Ibid.*

4. *Same—Appeal and Error.*—Under the provisions of our statute, Rev., 1054, *et seq.* (ch. 20), any party affected by the order of the corporation commission as to rates or charges for passengers by a street railway company, etc., is given the right of appeal to the courts from such order, and the rate of charges so fixed are to be considered just and reasonable charges for the services rendered, unless and until they shall be charged or modified on appeal, or the further action of the commission itself. *Ibid.*

5. *Same—Discrimination.*—A public-service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the corporation commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. *Ibid.*

6. *Statute—Common Law—Landlord and Tenant—Leases.*—The modification of the common law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by Rev., 1992, under certain conditions, is to some extent a legislative recognition that, without its provisions, the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common-law principle, has application, when the lessee is insisting on certain rights arising to him under the provisions of the lease. *Miles v. Walker*, 479.

STATUTES—*Continued.*

7. *Statutes—Partnerships—Contracts—Actions—Police Regulations—Retroactive Effect—Amendments.*—No vested interest can be acquired under a statute relating to the police regulations of the State and ch. 2, Laws of 1919, repealing the provisions of ch. 77, Laws of 1913, to the extent that the former statute denies a recovery by a partnership in a civil action that has not complied with its provisions, applies to pending actions and transactions prior to its enactment, there being no saving clause therein and nothing to show its effect should not be retroactive. *Real Estate Co. v. Sasser*, 497.

8. *Statutes—Legislative Powers—Amendments—Contracts—Vested Rights.* A Legislature has power, when it interferes with no vested right, to validate contracts or to ratify and confirm any act it might lawfully have authorized in the first instance. *Ibid.*

9. *Statutes—Amendments—Interpretation.*—The amendment should be construed with the act it amends, considering the evils arising under the old law and the remedy provided by the amendatory act which shall best repress the evils and advance the remedy. *Ibid.*

10. *Statutes—Taxation—General Powers—Particular Powers—License Tax—Municipal Corporations—Repeal.*—The particular intent expressed in ch. 189, Laws of 1919 (sec. 5) forbidding counties, cities and towns from imposing a license tax in excess of one dollar a year on those running a motor vehicle for hire, controls a general power prior conferred in a municipal charter, to levy a franchise or license tax thereon. *S. v. Fink*, 712.

STAY OF ORDER. See Corporations, 15.

STOCKHOLDERS. See Taxation, 5.

STREETS. See Municipal Corporations, 1, 3; Cities and Towns, 1.

STREET RAILWAYS. See Statutes, 2; Corporation Commission, 1.

SUBROGATION. See Insurance, Fire, 1; Fraud, 6; Actions, 8; Equity; Nonsuit, 1; Carriers of Goods, 5; Corporations, 9.

SUBSTITUTION. See Principal and Agent, 3.

SUMMONS. See Parties, 2; Appeal and Error, 7; Actions, 4; Pleadings, 9; Judgments, 13.

1. *Summons—Alias—Irregularities—Pleadings—Answer—Waiver—Process.*—Where a summons has been issued more than ten days prior to the commencement of a term of court, but served after it had commenced and no alias issued, and at the next term the complaint and answer have been filed, objection cannot successfully be maintained for failure of the plaintiff to keep up alias summons and for break in the chain thereof, all defects or irregularities in the preliminary process or notice of action being thereby waived by the voluntary appearance of the defendant. *Rector v. Logging Co.*, 59.

2. *Summons—Service—Publication—Affidavit—Process.*—An affidavit used as the basis for the publication of summons on a nonresident defendant is required to show, among other statutory requirements, in order to a valid service, that the defendant cannot be found in the State after diligent search. *Sawyer v. Drainage District*, 182.

SUMMONS—*Continued.*

3. *Summons— Service— Publication— Affidavits — Pleadings — Actions.* — Where the verified complaint in an action has been filed setting up a good cause of action at the time an affidavit for publication of service has been made, the two will be regarded together by the clerk in passing upon the matter, and the omission of the affidavit alone to state a good cause of action is not fatal. *Davis v. Davis*, 185.

4. *Summons—Publication—Nonresidents—Due Diligence—Not to be Found.* The fact that the defendant in an action to whom service of summons by publication is sought is a nonresident, is not a sufficient averment in the affidavit, it being necessary to show that after due diligence he cannot be found within the State, without which the process is fatally defective. *Ibid.*

5. *Summons—Service—Local Agent—Director General—Federal Statutes —Principal and Agent.*—Service of summons upon the local agent of a railroad company is sufficient on the company, and it is also sufficient upon the Director General of Railroads whether the Director General is regarded as holding analogous position to that of a receiver or as otherwise in charge of such companies under the intent and meaning of ch. 418, sec. 1, of the act of Congress of 29 August, 1916, and the proclamation of the President on 20 December, 1917, made in pursuance thereof. *Clements v. R. R.*, 225.

6. *Same—Nonsuit—Dismissal of Action.*—The carrier corporation can be sued jointly with the party operating its plant, whether the latter is a lessee, receiver, or Director General, and when sued jointly it is error to nonsuit the owner company, or to dismiss the action as to it. *Ibid.*

7. *Summons— Process— Service— Publication— Pleadings — Extension of Time—Implication—Statutes.*—Under the "Crisp Act" (sec. 1, ch. 304. Laws 1919) to "restore the provisions of the Code of Civil Procedure in regard to Process and Pleadings and to expedite and reduce the cost of litigation," where advertisement of the summons is required, by implication the time for filing answer is extended to twenty days after the completion of the service by publication; and where this time has not been allowed before judgment, it is an irregularity upon the face of the record which entitles the defendant to have it set aside. *Campbell v. Campbell*, 413.

8. *Same—Divorce.*—The provisions of Rev., 1564, putting in a denial of the plaintiff's allegations in an action for divorce, does not affect the defendant's right to twenty days after completion of the service of summons by publication, in which to answer or demur, etc. *Ibid.*

9. *Summons— Service— Publication— Affidavit — Divorce — Husband and Wife—Statutes.*—Order of publication of service of summons in an action by the wife for divorce is not objectionable as irregular, for the failure of the affidavit to set forth a good cause of action, when there are therein allegations that the husband had abandoned his wife, had left the State after having wrongfully appropriated her separate property to his own use, leaving her without support, and had subjected her to an inquisition of lunacy, and is now professionally engaged in another State upon a good salary, etc.; and this principle also applies to a suit of the wife to recover lands purchased

SUMMONS—*Continued.*

by the husband with her separate money, and title taken in himself without her consent, and in either case publication may be made under Rev., 442, susecs. 4 and 5. *White v. White*, 592.

SUNDAY.

1. *Sunday—Hotels—Restaurants—Cafes—Statutes.*—Under a statute, local to a county, prohibiting shops, stores, etc., from being kept open on Sunday for the sale of any goods, wares or merchandise within four miles of any incorporated city or town within the county, providing that the act shall not apply to hotels or boarding houses, or restaurants or cafes furnishing meals to actual guests, when not otherwise prohibited by law from being kept open on Sunday: *Held*, the words "restaurants or cafes" are substantially synonymous, and a place where stools and counters only were used for the service to customers of lunches, "weiners," and egg sandwiches, comes within the definition of the exception; and the sale of these not being unlawful, the fact that the place was called a "weiner joint" does not render it so. *S. v. Shoaf*, 744.

2. *Same—Evidence—Nonsuit—Trials.*—A "weiner" is a small sausage of unknown contents, commonly called a "hot dog," and to a great many people is a palatable and appetising article of food, and though a "joint" is regarded as a place usually kept for unlawful meetings, the term "weiner joint" does not render a "restaurant or cafe," so denominated in the evidence, an unlawful place, where all of the evidence shows that it was conducted properly and in an orderly manner for furnishing lunches, etc., to its customers, and where a statute excepts "restaurants and cafes," etc., from the operation of its provision prohibiting keeping stores, etc., open on Sunday, it is error for the judge to refuse defendant's motion to nonsuit upon the evidence which should have been granted and is equivalent to a verdict of not guilty. Gregory's Supplement, sec. 3265a. *Ibid.*

SUPERIOR COURTS. See Removal of Causes, 4; Courts, 8; Constitutional Law, 2.

Superior Courts—Clerks of Court—Appeal—Estates—Contingent Interests—Statutes—Jurisdiction.—Where proceedings for the sale of lands affected with contingent interests have been commenced before the clerk and transferred to the Superior Court in term, it is of the same effect if the proceedings had been commenced in the Superior Court, when the statute relating to such sales has been complied with in all respects, and in proper instances, it has the jurisdiction to order the sale of the land for reinvestment. *Waldroop v. Waldroop*, 674.

SURFACE WATER. See Waters, 1.

SURGEONS. See Abatement, 1.

SURVEYS. See Boundaries, 1.

SURVIVORSHIP. See Husband and Wife, 1.

TAXATION. See Constitutional Law, 1, 4, 5; School Districts, 3; Statutes, 10.

1. *Taxation—Realty—Sales—Liens—Judgments—Levy—Personalty—Claim and Delivery—Statutes.*—Taxes duly assessed on real property

TAXATION—*Continued.*

are declared by statute a lien thereon from a given date enforcible by action as well as by levy and sale, and the tax list, in the collector's hands, with the fiat of the register as clerk of the board of commissioners endorsed thereon, are declared by statute to have the force and effect of a judgment and execution. *Wilmington v. Moore*, 170 N. C., 52, as to actual levy upon personal property required before claim and delivery, cited and distinguished. *Cherokee v. McClelland*, 127.

2. *Taxation—Realty—Sales—Actions—Mortgages—Municipal Corporations — Counties— Purchasers— Penalties— Statutes.*—The lien on realty given for taxes and assessments due thereon is enforcible by action in the nature of an action to foreclose a mortgage, in which judgment may be entered for its enforcement, "together with interest, penalties, and costs allowed by law and costs of action," the action to be prosecuted in the name of the county when the lien is in favor of the State and county, Rev., 2868; and the holder of the certificate of purchase at a tax sale may institute such action to enforce collection of the amount due on giving the owner or occupant of the land ten days written notice of his purpose to bring the suit, his inability to find such owner or occupant excusing the failure to give such notice and every county or other municipality is given the right, and it is made its duty, to prosecute said suits, and whether by private individuals or by the county or by other municipal corporations, the plaintiff shall, except in cases otherwise provided by law, recover interest at the rate of 20 per cent on all amounts paid out by him, or those under whom he claims, as evidenced by certificates of tax sales, deeds thereunder, or tax receipts, etc. *Ibid.*

3. *Same—Notice.*—Where the lands of the owner have been regularly listed for taxation, sold for the nonpayment thereof after public notice given, of which the owner was fully aware, and bought in by the county at the tax sale, regularly had, and the ten days statutory notice had been served on him of the purchaser's purpose to bring the present suit, the defendant is held to the payment of the 20 per cent allowed by statute, and he may not successfully resist judgment therefor on the ground that the notice of the sale had not been given him as required by Rev., 2889, by tendering the amount of the taxes levied, and 6 per cent interest thereon. Rev., 2866, 2912. *Ibid.*

4. *Same—Available Personalty.*—The enforcement of the lien on realty given by our statutes by action, etc., by a municipality or county that has purchased at the sale, may not be avoided on the ground that the owner had personal property available from which the taxes on the realty should first have been collected. *Ibid.*

5. *Taxation—Corporations—Stockholders.*—Under the provisions of the Machinery Act of 1917, ch. 23, in order for the stockholder to be relieved from paying taxes on his shares of stock in a domestic corporation it must appear that the corporation itself pays a tax on its capital stock, and in foreign corporations, that two-thirds in value of its entire property is situated and taxed in this State, and that the said corporation pays a franchise tax on its entire issued and outstanding capital stock at the same rate paid by domestic corporations. *Brown v. Jackson*, 363.

TAXATION—*Continued.*

6. *Same—Foreign Corporations—Domestic Corporations—Railroads—Payment by Corporation.*—Under the provisions of ch. 77, Laws of 1899, being "An act to ratify the consolidation of the Petersburg Railroad Company with the Richmond and Petersburg Railroad Company. under the name of the Atlantic Coast Line Railroad Company of Virginia, and to incorporate the said Atlantic Coast Line Railroad Company in North Carolina," a corporation is created with power to sue and be sued, etc., and it is a domestic corporation. *Ibid.*

7. *Taxation—Corporations—Shareholders.*—The plaintiff's stock was issued by the Atlantic Coast Line Railroad Company of Virginia, a corporation created by the act of the Legislature of Virginia, and not by the corporation created by the General Assembly of North Carolina, and it not appearing that two-thirds in value of the property of the Virginia corporation is situated in this State, and it not appearing that said foreign corporation pays a franchise tax on its entire issued and outstanding stock in accordance with the statute, the plaintiff's stock is taxable in the hands of the shareholder, and does not come within the proviso in the statute. *Ibid.*

8. *Taxation—Situs—Personal Property—Statutes—Legislative Powers—Courts.*—It is for the Legislature to determine the *situs* of personal property for purposes of taxation, and it may provide different rules for different kinds of property, change them from time to time, and the courts may not, for considerations of expediency, disregard the legislative will. *Trust Co. v. Lumberton*, 409.

9. *Same—Banks and Banking—Shares of Stock—Corporations.*—The Machinery Act of 1919, ch. 92, changes the policy of the State as declared in ch. 234, sec. 42, Laws of 1917, as to the listing shares of bank stock by the holders where they reside, and fixing the *situs* of the shares for taxation for the purpose of county schools and municipal taxation at the residence of the owner, by omitting entirely the requirements of the act of 1917 that the owner of the shares shall list them at the place of his residence, and by imposing this duty on the cashier of the bank, requiring him to pay the State, county, special and municipal taxes, the intent of the statute being to require the bank to pay all taxes on the shares of its stock where it is located, and to relieve the owner from listing or paying them, except as he may be required to reimburse the bank. *Ibid.*

10. *Taxation—Constitutional Law—Bonds—Statutes—Statutory Amendments—Interest—Counties.*—Where in accordance with the Constitution and statutes, the question of an issue of bonds by a county for road purposes has been submitted by its proper authorities to its voters and favorably passed upon, they will not be declared invalid because before the enactment of a later statute only 5 per cent bonds were authorized, and the petition for the 6 per cent bonds was filed with the commissioners five days before the enactment of the amendatory law, and the order of the commissioners for the election and the election were after such enactment. *Comrs. v. Spitzer*, 436.

11. *Taxation—Automobiles—Motor Vehicles—Municipal Corporations—Void Ordinances—License Tax.*—A license tax imposed upon those running an automobile for hire by a municipal ordinance in excess of that allowed by a valid statute is void and unenforcible. *S. v. Fink*, 712.

TAXATION—*Continued.*

12. *Taxation—Statutes—Amendments—Interpretation—Automobiles—Motor Vehicles—License Taxes—Municipal Corporations—Ordinances.*—Sec. 6, ch. 140, Laws of 1917, entitled "An act to regulate the use of automobiles," required a license or registration fee rated according to horse power, and puts a limit upon the total registration fee authorized to be charged by a municipal corporation, that it should not be greater than one-half the fee required by the State, was repealed by ch. 189, Laws of 1919, being entitled "An act to provide for the construction and maintenance of a system of highways in the State and to enable the State to secure the benefits of Federal Aid therefor and for other purposes," and by sec. 5, raised the license fees to be paid to the State, graduated also as to horse power, and further, that "motor vehicles used for carriage of passengers for hire shall carry a special 'service' license to be issued by the Secretary of State, for which the license fee shall be twice the amount for like motor vehicles for private use," and that "no county, city or town shall charge any license fee on motor vehicles in excess of one dollar per annum." A city ordinance passed in pursuance with its charter, required a license tax of twenty dollars for running a motor vehicle for hire, and being in excess of the one dollar license fee allowed in the substituted statute, is void. *Ibid.*

13. *Taxation—Statutes—Municipal Corporations—Ordinances—License Tax—Criminal Law.*—Since the passage of ch. 189, Laws of 1919 (sec. 5) a city ordinance imposing a license tax of over one dollar a year for those running motor vehicles for hire, is void, though authorized by the city's charter, and where the person so operating them has complied with the statute, he may not be convicted of the offense imposed by the ordinance. *Ibid.*

14. *Taxation—Statutes—License Tax—Restrictions—Automobiles—Ownership—Hire—Municipal Corporations.*—The Laws of 1919, ch. 189, sec. 5, imposes a privilege tax for operating motor vehicles for private use and for carrying passengers for hire, restricting the imposition of a privilege tax in excess of one dollar a year by a municipality upon each class alike. *Ibid.*

TENANTS IN COMMON. See Instructions, 1; Judgments, 5; Parties, 2.

1. *Tenants in Common—Options—Contracts—Tender.*—Ordinarily tenants in common are not, merely from that relationship, authorized to make agreements or receive notices substantially affecting the estate or interest of each other in the common property, but when all of them have entered into a joint and binding agreement conferring a purchase option on a third person, such an instrument will constitute one the agent of the other for the purpose of a tender, which will turn the agreement into a bilateral contract, especially when their executed agreement, from its language and purport, contemplates an indivisible contract to be performed in its entirety. *Hudson v. Cozart*, 247.

2. *Same—Partial Consideration.*—An option given by tenants in common on their lands to be exercised by the grantee upon the payment of a specified sum of money, and erect thereon a redrying plant for the coming tobacco season for that year, necessitates his holding the title

TENANTS IN COMMON—*Continued.*

to the entire property, in order to its full performance, and his unaccepted tender of the purchase price alone is not of the full consideration he has agreed to pay, and will not entitle him to specific performance of the contract as a bilateral agreement. *Ibid.*

3. *Tenants in Common—Deeds and Conveyances—Feme Covert—Privy Examination—Statutes—Attorneys in Fact.*—Where a conveyance of land is made under a power of attorney sufficient in form by the heirs at law of a deceased owner of land, as tenants in common, but one of them, a *feme covert*, at the time, had not had her privy examination taken under the provisions of Rev., 952, both the power of attorney and the deed predicated and dependent upon it are ineffective to convey her interest, and she holds as a tenant in common with the purchaser, or those who may have acquired title under his deed. *Adderholt v. Lowman*, 547.

4. *Tenants in Common—Adverse Possession—Sale—Proceeds—Limitation of Action.*—As between tenants in common, occupation and sole appropriation of the proceeds of real property by one or more of the tenants will not alone ripen title as against the other cotenants for any period short of twenty years. *Ibid.*

5. *Tenants in Common— Entry— Possession — Presumptions — Ouster — Deeds and Conveyances.*—The distinctive and controlling feature of a tenancy in common is unity of possession, each tenant having a right thereto in the whole and every part of the property, and any one of them entering into possession is presumed to do so in pursuance of their rightful claim for themselves and all of their cotenants, and while there may be circumstances constituting an actual ouster, he may not change the nature of this occupancy by a mere declaration to that effect, or by a deed purporting to convey the whole property. *Ibid.*

6. *Same—"Color of Title"—Limitation of Actions.*—Where a grantee enters into possession of lands under a deed in sufficient form from one having power of attorney from tenants in common therein to make the conveyance, except that one of these tenants in common was a married woman whose privy examination had not been taken, her deed is not such ouster as will put in motion the statute of limitation, for it will not break the unity of possession, and the grantee's claim of title by seven years adverse possession under color of his deed is defective, not from the lack of "color," but from the character of his possession. The rule applying where allotment has been made in the lands to tenants in common under a judgment decreeing a sale for division, etc., distinguished. *Ibid.*

TENANTS FOR LIFE. See Estates, 9.

TENDER. See Contracts, 5, 8, 12.

TERMS OF COURT. See Removal of Causes, 2; Courts, 9.

THREATS. See Homicide, 2.

TIMBER. See Contracts, 2, 12.

TIME NOT OF THE ESSENCE. See Intoxicating Liquors, 3.

TITLE. See Parties, 2, 4; Ejectments, 1; Deeds and Conveyances, 1, 2, 4; Landlord and Tenant, 1; Estates, 5; Limitation of Actions, 1; Contracts, 9; Wills, 8; Principal and Agent, 6; Pleadings, 10; Constitutional Law, 3; Evidence, 7, 28.

1. *Title — Lands— Presumptions— Possession— Statutes.*— The statutory presumption as to possession and occupation of land in favor of the true owner, Rev., 386, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title," and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. *Moore v. Miller*, 396.

2. *Same—State's Title—Burden of Proof—Evidence.*—Our statute, Rev., ch. 195, providing "That in all actions affecting title to real property title shall be conclusively presumed to be out of the State, unless the State be a party to the action or the trial is one of a protested entry laid for the purpose of obtaining a grant," etc., does not create a presumption in favor of either party to the action falling without the exception, and does not relieve a litigant seeking to recover the land of showing the legal title in himself. *Ibid.*

3. *Same—Nonsuit—Judgments—Affirmative Findings.*—While in ejectment the plaintiff must recover upon the strength of his own title, though the title is conclusively presumed to be out of the State, and for the lack of evidence of his legal title a motion to nonsuit thereon is proper under Rev., 385, that the action be dismissed, it is error for the judgment to incorporate an adjudication in defendant's favor as to his title, as such is only permissible on affirmative findings sufficient to justify it. *Ibid.*

TORTS. See Drainage Districts, 1, 4; Cities, 1; War, 3; Negligence, 7, 8, 10.

1. *Torts—Damages—Misdemeanors—Statutes—Cutting Telephone Wires—Contracts.*—The willful cutting of a telephone wire in public use for hire is made a misdemeanor punishable by fine or imprisonment by our statute, Rev., 3845, and where such act has caused damage to another the action sounds in tort, making the tort feasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. *Hodges v. R. R.*, 566.

2. *Same—Physicians—Childbirth—Death of Wife—Pleadings—Demurrer.* Upon allegations of the complaint that the plaintiff had made arrangement with a physician to attend his wife at childbirth upon being called upon a public-service telephone line connecting his residence with a certain store, from which the call should be made, which would have been accomplished except for the defendant company knowingly, willfully, and unlawfully cutting this line upon its right of way, and that the failure of the attendance of the physician resulted in the death of the plaintiff's wife, which would not otherwise have occurred: *Held*, a demurrer thereto admits the allegations to the effect that the defendant's tort in knowingly, willfully, and unlawfully cutting the wire was the proximate cause of the failure of the physician to be present at the childbirth, and that had he been present, the plaintiff's wife would not have died, and the demurrer should have been overruled. *Ibid.*

TORTS—*Continued.*

3. *Torts—Physicians—Childbirth—Death of Wife—Damages.*—Where the defendant is liable in tort for the failure of the plaintiff to have a physician present at childbirth of his wife, proximately resulting in her death, the measure of damages is the value of the life of the wife to be estimated under the decisions of the Supreme Court, and are not too remote to be recoverable. *Ibid.*

TOWNSHIP COMMISSION. See Highways, 2.

TRAMROADS. See Employer and Employee, 6.

TRANSACTIONS. See Corporations, 6, 9.

TRANSCRIPT. See Appeal and Error, 20.

TRANSFER OF CAUSES. See Removal of Causes, 1, 4; Cities, 1.

TRIALS. See Insurance, 5; New Trials, 2; Evidence, 1, 3, 4, 5, 8, 10, 12, 26, 29; Issues, 7; Judgments, 3; Jurors, 1; Principal and Agent, 1, 10; State's Lands, 2; Railroads, 1, 2, 9, 10; Bailment, 2; Instructions, 5; Rape, 1; Cities and Towns, 1; Conspiracy, 2, 3; Intoxicating Liquors, 1, 4; Sunday, 2; Vendor and Purchaser, 2; Employer and Employee, 2, 5, 6, 10; Insurance, Life, 3, 6; Appeal and Error, 14; Register of Deeds, 1; Bills and Notes, 4; Carriers of Goods, 3; Negligence, 3, 4, 6, 9, 13.

Trials—Evidence—Weight and Credibility—Questions for Jury—Damages. The plaintiff sued defendants, tobacco warehouse proprietors, for balance alleged to be due him for salary, and at the same time defendants were suing the plaintiff for an amount alleged to be due for moneys paid out by them for tobacco on the plaintiff's individual account, and at his request, and upon the consolidation and trial of the two actions, the jury returned a verdict in defendant's favor, but in a less sum than demanded, from which defendants appealed, without any exception to the charge of the judge or tendering prayers for special instructions, upon the ground that if they were entitled to recover anything it should have been in the full amount of their claim: *Held*, the weight and credibility of the evidence was properly left to the jury, upon the issue joined, to determine thereon the amount due the defendants. *Harris v. Turner*, 322.

TRIAL BY JURY. See Courts, 18.

TRUSTS. See Wills, 2, 9; Estates, 5, 7; Principal and Agent, 5; Corporations, 15, 17; Mortgages, 1.

1. *Trusts—Deeds and Conveyances—Principal and Agent—Trustee—Compensation—Assignment—Debtor and Creditor.*—A deed in trust made by a solvent grantor conveying, while sick, all of his property to a trustee for its control and management, with the express power, upon demand, of revocation and reconveyance, with reasonable compensation to the trustee to be ascertained in a specified manner, will be construed to arrive at the intent of the parties, as gathered from the instrument itself, the circumstances surrounding its execution, and *Held*, to be the creation of an agency with compensation to the trustee for the duties he is thereunder required to perform, and not a deed in trust generally for the benefit of creditors. *Seawell v. McIver*, 535.

TRUSTS—*Continued.*

2. *Trusts—Deeds and Conveyances—Principal and Agent—Assignments—Fraud—Judgment—Execution.*—Where a deed in trust creates a mere agency for the management of the trustor's estate, the estate of the principal or trustor is not protected from execution under a judgment of a creditor, and the objection that it was in fraud of the rights of creditors is untenable. *Ibid.*

3. *Same—Assets—Accountability.*—Where a trustee is appointed under an instrument creating him a mere agent for the trustor in the management of his estate, and later and under a separate instrument for the general benefit of creditors, the same trustee is appointed, the trustee, or his state in the hands of his administrator, is entitled to a credit for the moneys, etc., he has paid to his principal under the terms of the first instrument, and accountable to creditors under the terms of the second one, for all property, etc., that has come into his hands as trustee, and his successor in the trust for the conduct of the estate while under his management. *Ibid.*

4. *Trusts—Deeds and Conveyances—Principal and Agent—Assignments—Bills and Notes—Endorsers—Judgments—Liens—Credits—Execution.* A deed created the trustee a mere agent for the trustor, and he was appointed a trustee in a later deed for the general benefit of creditors, and fraud, in the present action, was alleged in the execution of the former deed: *Held*, there being no fraud, as alleged, a bank, made a party defendant, is entitled to recover against the sureties on the note of the maker of the deeds in trust, acquired in due course, subject to whatever credits may be payable thereon in distribution of the assets among the general creditors; and that the lien of the judgment continues, subject to the right of the defendant bank, in the future to apply for leave to issue execution should the same then be deemed by it to have become necessary, but otherwise to be stayed until the termination of the action. *Ibid.*

5. *Trusts—Parol Trusts—Deeds and Conveyances.*—Evidence that at the time of his deed to lands to his wife the grantor said a certain portion was to go to one of his grandchildren, and a certain other portion to another of them, to which the wife replied that the children would be taken care of, corroborated by the testimony of another witness that immediately after the deed was signed the wife came out of the room and said that her husband had given her everything to do as she pleased with for life and after her death it was to be divided between the two grandchildren, is sufficient to be submitted to the jury to engraft a parol trust in remainder in favor of the grandchildren, upon the deed to the wife. *Richter v. White*, 684.

TRUSTEE. See Trusts, 1.

USURY.

1. *Usury—Banks and Banking—Agreement—Deposits—Contracts.*—Where the bank has followed an arrangement made by its depositor that the latter keep a certain per cent of the money borrowed upon his own paper and paper of its customers upon which he remains responsible, and which is good and collectible by the bank without trouble to it, and thus collects on the series of transactions a rate of interest in excess of the legal rate, the interest thus received is

USURY—*Continued.*

usurious and comes within the intent and meaning of the statute forbidding it. *Lumber Co. v. Trust Co.*, 211.

2. *Usury—Penalty—Limitation of Actions—Mutual Running Accounts—Statutes.*—Where the bank, in following an agreement with its depositor, charges an usurious rate of interest upon loans made to him upon a continued series of transactions whereby it received at a certain discount upon the commercial papers of its depositor received by him in the course of his business, but upon which the depositor remained bound, and the collection of which was without trouble to the bank, and the usurious rate was by reason of an agreement that he keep a certain per cent of the money borrowed from the bank on deposit there, the transaction constitutes a mutual running account, and an action for the penalty under our statute is not barred within two years next from the last item therein. Rev., 396 (2). *Ibid.*

3. *Usury—Waiver—Statutes.*—Statutes prohibiting charging usury or an illegal rate of interest are enacted for the benefit of the borrower who may waive his right thereunder. Rev., 1591. *Ector v. Osborne*, 667.

4. *Same—Judgment—Consent.*—By consent judgment entered in an action upon a note, wherein usury was set up by the defendant, and the parties have agreed upon a compromise in a certain sum, signed and entered by the court, the defendant waives his right under our usury law, and may not thereafter maintain the defense that a note he had given the plaintiff, in the amount of the judgment, was tainted with the usury of the first transaction. *Ibid.*

5. *Usury—Definition.*—There are four requisites to an usurious transaction: a loan express or implied; an understanding between the parties that the money lent shall be returned; there shall be a greater rate of interest than allowed by law paid or agreed to be paid, and a corrupt intent to charge the usurious rate, such intent consisting in knowingly charging or receiving excessive interest with the knowledge that it is prohibited by law; and it appearing in this case that the plaintiff, though induced by defendant to make the loan under a pretext of friendship, knowingly accepted the latter's note with usurious interest included, the transaction comes within the definition of usury. *Ibid.*

ULTRA VIRES. See Appeal and Error, 18; Eminent Domain, 2, 4, 5.

UNDUE INFLUENCE. See Appeal and Error, 26.

USES. See Wills, 2.

VAGRANCY. See Criminal Law, 3.

VALUE. See Contracts, 10; Evidence, 14.

VENDOR AND PURCHASER. See Contracts, 9; Appeal and Error, 10; Carriers of Goods, 4, 6.

1. *Vendor and Purchaser—Contracts—Warranty—Breach—Damages—Fertilizer.*—It is not required that the language used by the principal or his authorized agent in the sale of goods should have been intentionally false, or made for the purpose to deceive, in order to constitute a warranty as a matter of law, on the breach of which the

VENDOR AND PURCHASER—*Continued.*

purchaser may recover damages; for it is sufficient if the representation by the vendor is that the articles sold possessed a certain value and certain qualities, as, in the sale of fertilizer, that it was as good as any on the market with the same analysis, and as good as any sold having the same analysis for the making of cotton and corn, the declared purpose for which it was intended, and accordingly purchased. *Swift v. Meekins*, 173.

2. *Vendor and Purchaser—Contracts—Breach—Evidence—Questions for Jury—Trials.*—The defendant alleged a counterclaim for damages for the unreasonable delay of the plaintiff in delivering merchandise under the contract sued on, and there was evidence tending to show that this delay was not unreasonable, and that it was caused by the failure of defendant to pay for other merchandise, shipped under the contract, as he was thereunder obligated to do: *Held*, a judgment on the verdict in plaintiff's favor will not be disturbed. *Grain Co. v. Feed Co.*, 654.

3. *Vendor and Purchaser—Contracts—Compromise—Evidence—Damages.* Where the vendor and purchaser have compromised their differences under their contract, and have agreed upon a new contract in its place, any custom as to shipping instructions relevant only under the original contract are irrelevant to the action of the vendor thereafter brought to recover the purchase money, and to a counterclaim by the purchaser for damages for the alleged breach by the vendor. *Ibid.*

VENUE. See Divorce, 1.

VERDICT DIRECTING. See Instructions, 7, 9; Bills and Notes, 4.

VERDICT SET ASIDE. See Courts, 6, 7.

VERIFICATION. See Pleadings, 11.

WAIVER. See Insurance, Life, 2; Pleadings, 3; Summons, 1; Contracts, 8; Landlord and Tenant, 7; Usury, 3.

WAR.

1. *War—Statutes—Carriers of Goods—Lessor and Lessee—Government Control—Railroads.*—The acts of Congress as to Government supervision and control of railroads did not require or intend that the Government should take possession if the management could be procured by lease or agreement with just and reasonable compensation to the companies for the possession of its properties, the object of the legislation being to leave these corporations in the control of their own officials as far as possible, and to exercise only such general management as was necessary for the purposes of carrying on the war. *Gilliam v. R. R.*, 508.

2. *Same—Torts—Negligence—Return to Private Ownership.*—A lease to a railroad company by the Government of its railroad's properties under the statutory supervision and control for the purposes of carrying on the war, does not relieve the carrier of liability for the actionable negligence of its servants or employees, and the fact that the property of such corporation has, since the commission of the tort, been turned back to private ownership cannot affect the carrier's liability therefor, as lessee at the time of its commission. *Ibid.*

WARRANT. See Criminal Law, 1, 4, 5.

WARRANTY. See Vendor and Purchaser, 1; Insurance, Life, 5.

WATER. See Cities and Towns, 1.

WATERS.

Waters—Surface Waters—Damages—Negligence—Evidence—Railroads—Ditches—Culverts—Instructions.—Evidence tending to show that only since the construction of defendant's railroad track, without culverts, water had been ponded back on plaintiff's land, injuring his lands and crops, is sufficient to sustain a verdict for damages in plaintiff's favor, accruing three years next before the commencement of the action, it being negligence in either event, whether the damages were caused by the building of the road or the defendant's failure to keep its ditches clear or free from obstructions, etc.; and an instruction based upon evidence of this character embodying these principles, is correct. *Price v. R. R.*, 279.

WEIGHT OF EVIDENCE. See Courts, 6.

WILLS. See Estates, 5, 8; Contracts, 12; Deeds and Conveyances, 9; Appeal and Error, 26.

1. *Wills—Estates—Contingent Remainders.*—Where, by the terms of his will, the testator's intent is shown that the vesting of certain contingent interests shall be at the death of the first taker, it will control the general rule that they will best at the death of the testator. *Thompson v. Humphrey*, 44.

2. *Same—Vesting of Estates—Deeds and Conveyances—Trusts—Uses.*—A testator devised to his wife during widowhood or until she remarry, the income from certain of his lands, with remainder to his children at her death or remarriage, who should then be twenty-one years of age, or in case of death of such child, his or her child or children surviving to take the part the deceased parent would have taken if living; and should the wife die before any of the testator's children reached the age of twenty-one, the executor shall collect the income and expend it for the testator's children, until they arrive at that age, turning over the shares of the others to them; and divide the whole property when all the children reached their majority, and giving all of them, upon arriving at age, "a voice in the management of the property embraced in the will": *Held*, the contingency upon which the interest of the children would vest would be at the death or remarriage of the wife, and the successive arrival at age of the living children, the title as to each until that time being a defeasible fee, the grandchildren taking directly under the will, if they fall within its terms, and not by descent. *Hence*, before the death of the mother, holding the life interest, a valid conveyance of the fee-simple title cannot be made. The question of the limitation of fees to take effect alternately, etc., and the effect of the life tenant's deed as an estoppel, discussed by *Walker, J. Ibid.*

3. *Wills—Devise—Estates—Remainder—Defeasible Fee—Parent and Child—Adoption—Legitimation—Statutes.*—Where there is a limitation over by devise upon contingency that the ulterior remainderman die leaving "heirs lawfully begotten," such remainderman takes a defeasible fee, the intent of the testator being that the fee simple depend

WILLS—*Continued.*

upon his having children born in lawful wedlock, which may not be defeated by his having had only an illegitimate son, legitimated by proceedings under Rev., 263, 264, or adopted under sec. 177. *Love v. Love*, 115.

4. *Wills—Devise—"Lend"—Estates.*—The word "lend" applying to lands and used in a will, will be construed as "give" or "devise," unless it is manifest from the terms of the will, that the testator did not intend an estate therein to pass. *Jarman v. Dey*, 318.

5. *Same—Defeasible Fee—Contingency—Time of Happening.*—An estate "loaned" to testator's daughter R. during her natural life and at her death "I lend all of the" designated land "to the lawful heirs of her body, and to the lawful begotten heirs of their bodies, if any," standing alone, would convey the fee-simple title, but with the further expression, "in case she should die leaving no lawful issue of her body, then I give all the above described land to my son J., and his lawful heirs," the estate is defeasible in the event of the death of R. "leaving no lawful issue of her body," the contingency being the death of the devisor, but that of R. without leaving "lawful issue of her body," etc. *Ibid.*

6. *Wills—Specific Legacies—General Legacies—Pecuniary Legacies—Interpretation—Intent.*—As a rule, specific legacies do not abate with or contribute to general legacies, except when the whole estate is given in specific legacies, and there is a pecuniary legacy, or the intention of the testator appears from the will that the specific legacy shall abate. *In re Wiggins*, 326.

7. *Same—Codicils.*—Among other things, a testator devised to his daughter L. a certain tract of land and to his daughter J., certain enumerated articles of personalty, etc., and by codicil, revoked the devise to L., and substituted a bequest of $900 therefor, confirmed the bequest to J., and added thereto a bequest of $100: *Held*, the bequest to J. of all the personal property the testator may possess at his death not named in his will, and all moneys, "if any after paying debts, etc.," were general legacies, and the designated moneys and enumerated personal properties were specified legacies, which would not abate with or contribute to the general legacies, and the residue of the fund was properly to be applied in payment of the pecuniary legacies; and there being general and specific legacies in the will, the latter do not abate in payment of the pecuniary legacies. *Ibid.*

8. *Wills—Devise—Estates—"Issue"—Children—Correlative Terms—Deeds and Conveyances—Fee-simple Title.*—The intention of the testator as gathered from the terms of the will control as to whether the word "issue" shall mean "children" and slight indications thereof may be sufficient to show his intention that they should have a correlative meaning; and where the devise was a child of the testator and the disposition of other lands to his other children indicates that he meant "children" by the word "issue," that meaning will be given; and a devise to testator's daughter M. during her natural life and after her death, to her issue and her heirs, the deed of M. and her children, assuming that she will not thereafter have other children, will convey a fee-simple title to their grantee. *Etheridge v. Realty Co.*, 407.

WILLS—*Continued.*

9. *Wills—Intent—Trusts.*—The intent of the donor as gathered from the entire written instrument will control its interpretation as to the creation of a trust, without the use of peculiar or exact declarations, as "upon trust" or "trustee," etc., if such intent is otherwise sufficiently evident. *Waldroop v. Waldroop*, 675.

10. *Same—Instructions—Education of Children.*—After making two small bequests in money to be paid out of the "proceeds" of his estate, a testator devised and bequeathed all of the remainder of his property "real, personal and mixed," to his wife until the youngest child shall become of age, then to be equally divided between her and her children of his marriage, coupled with an instruction to give each of the children an equal education fitted to their station in life, with further provision for the payment of his debts and "whatever is left of my estate to be disposed of as aforesaid." The condition of the testator's estate, the expressions he used in his will, as to the "proceeds," "whatever is left of my estate," etc., and his evident knowledge of the character of his property, together with his direct instruction as to the education of his children, sufficiently evidenced his intent that it be held in trust subject to carrying out his instructions, and an order for the sale of his land for that purpose, under the necessity of the case, by the Superior Court, is affirmed, with the exception that a sufficient amount be withheld from the proceeds "for the education of the minor children." *Ibid.*

WITNESSES. See Appeal and Error, 2, 32, 33; Evidence, 31.

1. *Witnesses—Cross-examination—Leading Questions—Court's Discretion—Criminal Law—Incriminating Evidence.*—It is within the discretion of the court to permit the State, upon the trial of homicide to ask leading questions of an unwilling witness, as in this case, where the witness had been indicted in another bill for the same offense, and the question asked was evidently to refresh the memory of the witness from the record of his voluntary testimony in *habeas corpus* proceedings in the case, without objection or appearance that the evidence tended to incriminate the witness. *S. v. Bailey*, 725.

2. *Witness—Evidence—Character.*—Where the prisoner on trial for a homicide takes the stand in his own behalf he puts his character in evidence, and it is subject to impeachment, and not restricted to matters brought out on the direct examination. *Ibid.*

WRITING. See Criminal Law, 5; Contracts, 1, 3; Evidence, 24.

WRONGFUL DEATH. See Abatement, 1.

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